No. 95

In the

Supreme Court of the United States

OCTOBER TERM, 1960

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

INDEX

	Page
OPINION BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	3
STATUTE INVOLVED	5
STATEMENT	6
Trial Court's Conclusions as to Boycott	9
Damages	10
Responsibility of the International Union	12
REASONS FOR GRANTING THE WRIT FOR THE LOCAL UNION	14
A. Conflict	14
1. The Courts of Appeals' Opinions	15
2. The N.L.R.B. Opinions	17
3. The "Reserved Gate" cases	19
B. The Constitutional Right of Free Speech	20
C. The Importance of the Picketing Issue	21
D. Damage Issue	23
REASONS FOR GRANTING THE WRIT FOR INTERNATIONAL UNION	25
CONCLUSION	29

Appendices

Page

Appendix A

Opinion of the Court of Appeals for the Sixth Circuit, February 15, 1961 ..... A1

Statutory Provisions, Taft-Hartley Act, §303(a)—29 U.S.C.A. §187 ..... A31

Appendix B

Judgment—Humko A36

—Phillipy A37

—Kuhne-Simmons A38

Appendix C

Order Denying Rehearing, March 31, 1961 ..... A39

Appendix D

District Court's Findings and Conclusions A40

Appendix E

Additional Statutory Provisions A60

Page

Axel Newman v. Sheet Metal Workers, 3 Utah 2d 377, 277 P. 2d 922 26

Brick & Clay Workers v. Deena Artware, Inc., 198 F. 2d 637 23

Carpenters, Local 131 v. Cisco Corstruction Co., 266 F. 2d 365 23

Carpenters Union v. Ritters Cafe, 315 U. S. 722 21

Chauffeurs, etc. v. Newell, d/b/a El Dorado Dairy, 356 U. S. 341 21

Coronado Co. v. United Mine Workers, 268 U. S. 295 25

DeMaio v. Local 80-A, United Packinghouse Workers, 29 N. J. Super. 341, 102 A. 2d 480 26

DiGiorgio Fruit Corp. v. NLRB, 191 F. 2d 642 26

Ford v. United Brotherhood of Carpenters, 315 P. 2d 299 26

Harker v. McKissoch, 7 N. J. 323, 81 A. 2d 480 26

IBEW v. NLRB, 341 U. S. 694 17, 19

In re International Brotherhood of Electrical Workers (Franklin Electric Construction), 121 NLRB 143 at 146 26

In re International Brotherhood of Teamsters, etc. (Alexander Warehouse), 128 NLRB No. 105, 46 LRRM 1409 18

In re Retail Clerks etc. AFL-CIO (Montgomery Ward), 122 NLRB 1264 18

International Brotherhood of Teamsters, etc. et al. v. U. S., 275 F. 2d 610 28

Local 618, Automotive, etc. Union v. NLRB (Site Oil), 249 F. 2d 332 15, 16

Longshoremen v. Hawaiian Pineapple Co., 226 F. 2d 875 23

Page

Longshoremen v. Juneau Spruce Corp., 342 U. S. 237 23

Mile Branch Coal Co. v. United Mine Workers, F. Supp. , 42 LRRM 2169 26

Mine Workers v. Lambert, 214 F. 2d 487 23

Mine Workers v. Meadow Creek Coal Co., 263 F. 2d 52 23

Mine Workers v. Patton, 211 F. 2d 742 23

Morgan Driveway, Inc. v. Intl. Brhd. Teamsters, 268 F. 2d 871 25, 26

NLRB v. Associated Musicians, 226 F. 2d 900 17

NLRB v. General Drivers, etc. (Otis-Massey), 225 F. 2d 205 15, 16

NLRB v. International Rice Milling Co., Inc., 341 U. S. 665, 71 S. Ct. 961 19

Osborne Mining Co. v. Mine Workers, 38 Labor Cases ¶65,741 23

Pennsylvania Mining Co. v. United Mine Workers, 28 F. 2d 851 26

Seafarers Union v. NLRB (Salt Dome), 265 F. 2d 585 15, 16

Seidner v. Fish, 131 Misc. 203, 226 26

Thornhill v. Alabama, 310 U. S. 88 21

United Brick & Clay Workers v. Deena Artware, 198 F. 2d 637 17

United Construction Workers v. Haislip Baking Company, 223 F. 2d 872 26

United Mine Workers v. Coronado Co., 259 U. S. 344 25

Statutes and Other Authorities

	Page
37 ALR 2d 687 (1954)	19
Labor Management Relations Act, 61 Stat. 136, 29 U.S.C., §303(a)(1)	10, 14, 15, 17, 19
§157	21
Labor Management Reporting and Disclosure Act of 1959, 73 Stat. 519, 29 U.S.C.A. §401 et seq.	26
Moody's Industrial Manual, 1959, p. 2616	22
Senate Report No. 187, 86th Cong. 1st Sess.	27
Standard and Poor's "Standard Corporation Descriptions" (1959), p. 2965	22

No. .....

In the

Supreme Court of the United States

OCTOBER TERM, 1960

LOCAL UNION 984, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, ETC., *et al.*,

Petitioners,

v.

THE HUMKO COMPANY, INC. (A Division of National Dairy Products Corporation), RALPH KENT PHILLIPY, and KUHNE-SIMMONS COMPANY, INC., *et al.*,

Respondents.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

International Brotherhood of Teamsters, Francis Murtha, a representative of said International, Local Union 984 of Memphis, Tennessee, and R. A. Farrell, president of said local union, respectfully pray that writs of certiorari issue to review the judgments of the United States Court of Appeals for the Sixth Circuit entered in three cases on February 15, 1961. In the interest of brevity all three cases are presented in a single petition, inasmuch as they were consolidated for purpose of trial and appeal.

OPINION BELOW

The Opinion of the Court of Appeals for the Sixth Circuit (by District Judge Thornton, sitting by designation) rendered in these consolidated cases on February 15, 1961, is reported at 287 F. 2d 231. It is carried in the labor law services at 42 Labor Cases ¶ 16,780 and 47 LRRM 2651, and is set out as Appendix A hereto, pp. A1 to A35, *infra*.

The District Court's unpublished findings and conclusions are reproduced at pp. A40 to A59, *infra*.

JURISDICTION

The judgments of the Court of Appeals were entered on February 15, 1961, Appendix B, pp. A36 to A38, *infra*. Rehearing was denied March 31, 1961, Appendix C, p. A39, *infra*. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Statement

Local Union, although in dispute with employer at only one location picketed at three sites occupied by primary employer: (1) Memphis, Tennessee, plant 1 (where the local union as the bargaining agent was on strike); (2) Memphis, Tennessee, plant 2 (where there was no union and no strike); (3) Champaign, Illinois (where the plant was not yet in operation; but primary employer was supervising construction and was interviewing and employing production personnel, sending them to Memphis for training at the operating plants, with intention of returning them to Champaign as operating employees upon completion of construction). The Champaign site was jointly occupied by primary employer and three construction firms who were completing the new Champaign plant. The picketing at Champaign, though peacefully conducted with signs truthfully advertising dispute with primary employer, had the effect of inducing construction employees not to cross the picket line, shutting down construction for two weeks.

Question One

Is picketing at (3) *supra* in support of labor dispute at (1) *supra* unlawful under §303(a)(1) of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. §187(a)?

Question Two

Is picketing at (3) *supra* for the purpose of requiring employer to bargain with union—the certified bargaining agent at another of his plants—protected by the proviso to §303(a)(2) of the Act?

Question Three

Is such picketing protected by the First Amendment?

Question Four

Does an International Union occupy such a "status of parenthood" vis-a-vis a local union chartered under the provisions of the International Constitution to render International liable for "illegal activity" of the local which was committed during a strike?

Question Five

Where peaceful picketing is conducted for an unlawful objective, and results in shutdown of construction, are the following damage claims recoverable under §303(b) of the Act?

A. Damage claims by primary employer:

1. Pay to Pinkerton Service for extra guards.
2. Salaries of office and engineering employees at picketed site.
3. Taxes and insurance on plant property.
4. Interest on investment in plant property.

B. Damage claims by Building Contractor:

1. Claims made upon building contractor by his sub-contractors, evidenced only by invoices and the statement that the sub-contractors "are expecting payment from [Building Contractor]".
2. Wages voluntarily paid to employees who refused to cross the picket line.
3. Duplicate payment for "salaries to supervisors" and "administrative expense".
4. Rental value of construction equipment valued in accordance with employer claims at rates in excess of those on which award was made to other plaintiffs.

STATUTE INVOLVED

The Labor Management Relations Act of 1947 as amended; (61 Stat. 136; 29 U.S.C. §151 et seq.) particularly §303(a)(1) and (2) of said Act,[1] (29 U.S.C. §187) reprinted in Appendix A, *infra*, pp. A31 to A33.

Sections 7 and 13 of that Act are also important to this case. They are set out at Appendix E, p. A60.

[1]This case was tried under the Act effective prior to the 1959 amendments. Changes in form and language by the 1959 amendments did not change the rights and duties here at issue.

STATEMENT

Damage awards aggregating $97,625.30 under §303 of the Taft-Hartley Act, 29 U.S.C. §187, were rendered by the United States District Court at Memphis, Tennessee against Local Union 984, its president; the International Union by which the local was chartered, and an "organizer" for the International. Damage judgments favored Humko Division of National Dairy Products Corporation[2] (the primary employer, $57,013.05); Phillipy and Company (the mechanical contractor employed on the Humko plant site at Champaign, Illinois, $11,264.72); and Kuhne-Simmons Company, Inc. (the principal contractor engaged on the Humko plant site at Champaign, $29,358.52).

The Court of Appeals' summary of the trial court's fact findings (pp. A3-A9, *infra*) ignores undisputed facts; accordingly we here restate the case.

Local 984 was the certified exclusive bargaining agent for employees at Humko's Thomas Street, Memphis plant (207a).[3] The local union sought to bargain for an acceptable collective bargaining contract covering the Thomas Street Humko employees for which it was the certified bargaining agent (295a; 418a*ff.*). Unable to obtain a satisfactory contract, Humko employees authorized Local 984 to call a strike which became effective July 8, 1957 (426a, 209-210a). The purpose of the strike was "getting the company to bar-

[2] Hereinafter called "Humko".

[3] References throughout this portion of the petition for certiorari are to the printed two volume Joint Appendix filed in the Court of Appeals.

gain collectively and get wages and working conditions adjusted properly" (426a).[1]

Picketing to require Humko to bargain with the certified representative of the Memphis Thomas Street plant commenced July 8, 1957, at two locations in Memphis, viz: The Humko Thomas Street plant, and the Humko Pope Street Chemical plant (296a; 307a). The right of the local to picket at the two sites in Memphis was not contested (307a).

On the morning of July 12, 1957, pickets from Local 984, who had been brought from Memphis, Tennessee by an officer of Local 984, formed a picket line at the sole entrance gate to the Midwest Refinery of Humko at Champaign, Illinois, carrying placards bearing the legend (689a-690):

"Production, Maintenance and Drivers
employees of
THE HUMKO CO.
MEMPHIS, TENNESSEE
ON STRIKE
for better wages and working conditions
Members of General Drivers, Salesmen
& Warehousemen Local Union No. 984, AFL."

The picketing in Champaign continued from July 12 through July 23, 1957. Employees of Phillipy, Kuhne and other contractors engaged in construction work appeared for

[1] Each plaintiff concedes in its original complaint that the purpose of the picketing is "compelling Humko in Memphis, Tennessee to make concessions for employees there employed with regard to wages, hours and working conditions in a collective bargaining agreement sought by the defendant Local 984" (4a;20a;33a-34a).

work, but none of such employees crossed the picket line from July 12-23, 1957. The construction work was thus completely shut down by the Champaign picketing (690a), but resumed on the morning of July 24, 1957 (692a).

Both the district court and the Court of Appeals ignored the following undisputed facts:

Humko was doing business at the Champaign site which was picketed.[6] Humko was there engaged, through its own engineer and their staff, in the supervision of construction and in necessary programs and operations concerned with ultimate production such as personnel training programs and hiring (535a; 194; 529-531).

---

[5]It was "approximately two weeks" before a normal resumption of construction work was effected (692a).

[6]Humko's counsel conceded that during the picketing at Champaign Humko was there doing business, viz. (91a-92a, emphasis added):

"MR. CLIFTON: * * * Our position is that there was not production in the sense of oil actually being produced at that time. We think, however, *there were necessary programs and operations concerned with ultimate production, such as training programs, training of personnel and hiring*, and so forth, which can be clarified in the broader sense as production.

"I did not want my statement to be taken as there was no production going on.

"THE COURT: You don't contend Humko was engaged in normal business activities in Champaign during this period, do you?

"MR. CLIFTON: *Yes, I do, Your Honor. It is very much normal to the Humko activities to build that plant and hire and train employees at that plant site, and take them to Memphis for further training, and further, to send them back to Champaign for actual duties on the job.*

"THE COURT: You say no manufacturing production was going on during that time?

"MR. CLIFTON: There was not any actual oil being produced on the premises at that time, to my knowledge. I think *there were preliminary activities in the terms of personnel, which was very much their normal business activities*, however."

[7]This activity was effected by another "division" of the corporate entity. (518a*ff.*; 523a, 193a; 269a; 198a*ff*; 319*ff.*)

Humko was actively engaged in business at this site immediately before and during the picketing.[9] Humko advertised in Champaign newspapers to recruit employees (535a) and conducted employment interviews at the plant office on the construction site in Champaign (194a; 529-531a),[10] and from this point in Champaign referred prospective employees to the Memphis plant for training. (216a*ff*; 300a; 518*ff*.) New employees for Humko were hired at the Champaign site and from this point were sent to Memphis.[10] (529a; 261a*ff*; 300a*ff*.) Materials were shipped to and from the Champaign site via Humko trucks driven by employees within the Memphis bargaining unit (155a-159a; 527a). Labor relations for both the Memphis and Champaign locations were handled centrally by Humko personnel from the Memphis office. (200a*ff*.)

The Trial Court's Conclusions as to the Boycott

The district court filed Conclusions of Law (698a-701a) which held "the primary situs of the labor dispute * * * was at the Thomas Street plant of Humko in Memphis, Tennessee. * * * The placing of the pickets at Humko's

[9] Humko maintained employees (192a; 204a; 299a), an office (191a; 488-489a) and a telephone, listed as Humko's phone, at the Champaign site. (537a) Much of the equipment on the Champaign site was owned by Humko (tanks, 527a; automobiles, trucks, office equipment, 528a; 540a). Humko maintained an office on these premises (191a) and employed a guard force to patrol the property (196a; 218a; 268a). A listing of Humko employees stationed at Champaign will be found in the record at App. 299 and Konald Exhibit 1. (563a). A sign placed on the premises by National advertised to the public that the premises belonged to National-Humko and "clearly identified it as a Humko plant site". (278a).

[10] Humko was committed to a policy of hiring "local people" at Champaign (531a).

[10] During July, 1957, trainees hired in Champaign were working behind the picket line in Memphis in training for eventual return to Champaign where the skills and training acquired in Memphis would be utilized (216a).

Champaign plant constituted a secondary boycott in violation of Section 187(a)(1), Title 29 U.S.C.A. The acts of Local 984 in sending pickets from Memphis, Tennessee, the situs of the primary employer, Humko, to Champaign, Illinois, setting up a picket line at the construction site there, *had the effect of* inducing and encouraging the employees of Phillipy and Kuhne, secondary neutral employers, to strike, or engage in a concerted refusal to work or perform services for Phillipy and Kuhne which, in turn, *had the direct effect of* attempting to force Phillipy and Kuhne to cease doing business with Humko, all of which is prohibited by the act * * *." (699a, Emphasis added.)

Note that the trial court's conclusions of law are made in terms of the effect of the picketing. The statute speaks in terms not of effect, but of objective.

The Damages

The District Court made specific damage awards, making findings as to the basis for each component of the total, and specifying to the penny its damage awards and the bases therefor. Unions asserted to the Court of Appeals that the damages assessed were not based on competent evidence and were not shown to be proximately caused by the picketing. The Court of Appeals, misconstruing the trial court's damage determination as based upon inability to ascertain the damages with certainty, states that uncertainty as to the extent of damages does not preclude damage award. Actually, the trial court had not been uncertain as to the extent of damage. To the contrary, the

trial court findings specified damages to the penny. The question raised, but glossed over by the Court of Appeals, is whether such specifications of damages are actually based on competent evidence and proximately caused by the picketing, viz:

The trial court found (695a-698a) specific items of damage and taxed union for such claims as wages voluntarily paid by plaintiffs to those who would not cross the picket line (697a), pay to "trainees" at the Memphis plant during the period of the Champaign picketing (301a-305a), pay to Pinkerton for guards (695a), salaries of those who did cross the picket line (695a), claims made by subcontractors evidenced only by invoices and hearsay statement that claimants "are expecting payment" (325a-327a, 408a), claims as to rental value of idle construction equipment, duplicate payment for "salaries to supervisors" and "administrative expense" (659a-660a). Union urged to the Court of Appeals that these damage awards were erroneous, based on incompetent evidence and not having been shown as the proximate result of the picketing. The trial court admitted the evidence with respect to these matters for the ostensibly limited purpose of "showing the contentions more or less of these plaintiffs in working this case out" (109a; *cf.* 214a). Yet without other support in the record the trial court transformed plaintiffs "contentions" into damage awards so substantial that a local of less than two thousand workers, with assets of less than ten thousand dollars is saddled with judgments totalling over $90,000.00.

The Court of Appeals held (*infra*, p. A26) that the damage awards were not excessive,[11] but did not mention petitioners' claim that the specified damage items were not shown to be the proximate result of the picketing.

The Responsibility of the International Union

The trial court found that Local 984 was responsible for the Champaign picketing (689a, Finding XIV, 699a, Conclusion IV), yet concluded that the International was subject to liability for the damages which flowed from the local's picketing (699a). See Appendix D, pp. A46, 47; A57.

The Court of Appeals affirmed, holding (*infra*, p. A23) "whether the International Union is liable depends upon the conduct and/or activity of Francis J. Murtha who, during the period involved in this controversy, identified himself as a general organizer of the International Union living in Memphis, Tennessee." Although noting that the local union did not request approval, sanction or assistance from the International in connection with the Humko strike, the Court holds that inasmuch as Murtha participated in the negotiations at Memphis, at times both before and during the Champaign picketing of which Murtha had notice [after it began], and also had knowledge of a complaint (sic) (charge?) filed with NLRB

[11]Except with respect to $13,500.00 item for attorneys' fees which the Court of Appeals disallowed; and items of $10,214.45 and $3,879.45, salaries and expenses of trainees at Memphis as to which there was a remand "with instructions that consideration be given to an adjustment in the award of damages in the event it is determined that the time and expenses of the trainees at Memphis, who were idled as a result of the Memphis strike, are included in the total award." (Infra, p. A 29.) It is clear that the District Court did include these in the award [695a, finding XXII(a) and (b)].

in relation to the Champaign picketing,[12] "it is not unreasonable to believe" that local officials would have cleared with the International before sending pickets to Champaign (*infra*, pp. A23-A24). The Court proceeds to surmise,[13] without any evidence in support, that Murtha must have advised the Joint Council and General President of the picketing in Champaign,[14] and concludes that "the dominion exercised over the Local Union by the International" as evidence by provisions of the International Constitution "establishes a status of parenthood that brings the local union into the family by depriving such local union of that degree of independence associated with, and a necessary ingredient of, an autonomous organization" (*infra*, p. A25). The court concludes that Murtha "and his principal, the International, knew, or should have known, of the secondary boycott in Champaign. By its silence and inaction, the International, through Mr. Murtha, acquiesced in and condoned the illegal activity of the local union * * *." (Ibid).

The Court ignores the undisputed facts that long prior to the strike Murtha advised the Local that there would be

[12]This charge was filed by Kuhne against the *Local Union* only (621a-627a).

[13]The Court's rationale is; *infra* p. A24:

"It is unrealistic to believe that Mr. Murtha, as a paid investigator for the International Union, would not have had facts in his possession which were indicative of a clear-cut violation of a mandatory provision of the constitution of the International Union—that Local 984 was becoming involved in a boycott (Champaign) and in a lawsuit (with the neutral employer and the National Labor Relations Board at Chicago) without giving the Joint Council immediate notice, and thus indirectly the General President of the International Union, of the contemplated action, or of the serious difficulty (the lawsuit). Mr. Murtha would further have us believe that he stood idly by, as a paid investigator of the International Union, and did not make this violation known to his superiors in the International Union."

[14]The trial court did not so find. Nothing in plaintiffs' pleadings so alleges.

no financial help from the International Union (464a), and he knew nothing of the picket line in Champaign "until it was put up there" (460a). Murtha's presence at the negotiations was *solely at the request of employer's attorney* (428a-429a; 449a-450a).

I.

REASONS FOR GRANTING THE WRIT FOR THE LOCAL UNION

A.

Conflict

Petitioners contend that where parties are in a labor dispute, the dispute exists regardless of the locations at which they may find each other.[15]

The Courts below have construed §303 of the Labor Management Relations Act to ban peaceful and truthful picketing of primary employer, Humko, unless the picketing is limited to the locale at which the labor dispute originates. Such holdings are contrary to decisions in other Circuits and to the decisions of N.L.R.B. which hold substantially similar conduct privileged, indeed, protected by other provisions of the same statute.

[15]Note the broad definition of labor dispute in Section 2(9) of the statute:

> "The term labor dispute includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee."

1.

The Courts of Appeals' Opinions

Three Courts of Appeals explicate the clear right (under Section 7 of the Act) of a union in dispute with employer to picket not only the point of origin of the dispute, but also to direct picketing at the primary employer at other locations. *NLRB v. General Drivers, etc. (Otis-Massey), 225 F. 2d 205 (C.A. 5); Local 618, Automotive, etc. Union v. NLRB (SITE Oil), 249 F. 2d 332 (C.A. 8);* and *Seafarers Union v. NLRB (Salt Dome), 265 F. 2d 585 (C.A.D.C.).*

In the instant case this authority was cited to and specifically rejected by the District Court which held that "the primary situs of the labor dispute * * * was at the Thomas Street plant of Humko in Memphis, Tennessee * * *. The placing of the pickets at Humko's Champaign plant constituted a secondary boycott in violation of Section 187(a)(1), Title 29, U.S.C.A. [Section 303(a)(1)] * * *. The acts of Local 984 in sending pickets from Memphis, Tennessee, the situs of the primary employer, Humko, to Champaign, Illinois, setting up a picket line at the construction site there, had the effect of inducing and encouraging the employees of * * * secondary neutral employers, to strike * * * which * * * had the direct effect of attempting to force [secondary neutral employers] to cease doing business with Humko, all of which is prohibited by the Act." See pp. A56, A57, *infra.*

The Court of Appeals affirmed, refusing to apply the cited holdings from other Circuits because, in its view,

"there is not presented a factual situation which fitted into the mold of the citations" (Slip Opinion, p. 15). Actually, this Court of Appeals is in conflict with the cited authority. For the ultimate facts here, as found by the trial court, when compared with the ultimate facts in *Site Oil*, *Otis-Massey*, and *Seafarers* present the same issue, but the result is different in the Eighth, District of Columbia, and at least one case in the Fifth Circuit.

In *Otis-Massey*, the Fifth Circuit was explicit that

> "no warrant exists * * * under the guise of fact finding to fix the 'situs' of a dispute at only one of a primary employer's numerous business activities * * *
>
> "Irrespective of the * * * situs theory * * * peaceful picketing upon common premises, directed solely against the primary employer with whom a labor dispute exists, is still lawful under the Act, and * * * any adverse effect upon secondary neutral employers must necessarily be viewed as incidental to the lawful exercise of that statutory right (citing cases)." *225 F. 2d 205, 209, cert. den. 350 U. S. 914, 76 S. Ct. 198.*

Similarly, in *SITE Oil* and *Salt Dome*, the Eighth and District of Columbia Circuits have correctly determined that picketing of primary employer at primary employer's place of business (though not the locale at which primary employer alone would be affected by the picketing) is legitimate, even though the effect of such lawful picketing is to induce others there employed to refuse to cross the picket line. As the Eighth Circuit observes in *SITE Oil*, denial of this right obliterates the Congressionally sanc-

tioned concerted activity protected by Section 7 of the Act.[16]

2.

The N.L.R.B. Opinions

Important issues in the administration of the labor laws are presented where NLRB holds lawful the very activity which a court holds exactly similar statutory language to make unlawful and subject to damage award. The damage suit section of the statute (§303) is the exact counterpart[17] of §8(b)(4) which defines "unfair labor practices", which by Section 10, the NLRB is empowered to prohibit.

The instant opinion holds unions liable for substantial damages for engaging in conduct which NLRB holds lawful. Here the courts have held picketing at Champaign "unlawful", "secondary" activity. NLRB has recently held the contrary.

The *Otis-Massey* petition for certiorari thus presented the plea that this court reject the precise position upon which we here rely. Certiorari was denied, *350 U. S. 914, 76 S. Ct. 198.*

[16]The courts below were obviously led to their finding that the Champaign picketing was secondary by an earlier case in the Sixth Circuit, *United Brick & Clay Workers v. Denna Artware, 198 F. 2d 637*, decided on much different facts; inasmuch as the picketed property in *Deena* was not occupied in any sense by the primary employer. See *198 F. 2d 637 at 641.*

Here, the Champaign picketing was at a principal place of business, occupied by Humko, indeed, the Champaign premises were the hiring point for potential strikebreakers in Memphis (194a, 261a, 530-1a; pp. 8*ff supra*), and Humko acted through its own engineering staff and was in effect its own general contractor. These factors distinguish the Second Circuit's *NLRB v. Associated Musicians, 226 F. 2d 900* upon which the courts below relied. See 699a. These factors also make inapposite *Deena Artware* where "the physical facts * * * show clearly that it was not necessary to extend the picket line around the area of construction in order to cover all the entrances to the existing plant and warehouse * * *." *198 F. 2d 637 at 643.*

[17]In *IBEW v. NLRB, 341 U. S. 694*, this Court noted that §8(b)(4) and §303 are exactly similar and the "words are entitled to the same meaning", *341 U. S. at 703.*

In the case of *International Brotherhood of Teamsters, etc. (Alexander Warehouse), 128 NLRB No. 105; 46 LRRM 1409*, decided August 25, 1960, where a strike in Joliet was followed by picketing of other warehouses of the same employer in other cities, the NLRB says that such picketing does not violate the Act, viz:

> "• • • we find that Respondents' picketing and related conduct at Alexander's Peoria and Urbana warehouses was lawful primary activity. Though the economic dispute with Alexander directly involved only Alexander's Joliet employees, Respondents had the right to bring pressure upon Alexander at each and every one of its warehouses. The Peoria and Urbana warehouses are no more to be considered neutral premises for purposes of applying the provisions of Section 8(b) (4) (A) than are the premises of an employer who 'allys' himself with a primary employer. Under the 'ally' doctrine a union may engage in picketing at the operations of a primary employer and at all operations of employers who 'ally' themselves with the primary employer, under the same conditions as govern its picketing at the primary employer's premises. • • • [citing Int'l. Union of United Brewery etc. (Coors Co.) v. NLRB, 272 F. 2d 817 (C.A. 10)] • • •."

Moreover, NLRB holds that the secondary boycott provisions of Section 8(b)(4) [the exact counterpart of §303] "do not isolate one store in the company's chain from other stores therein, nor do those provisions provide that economic pressure may be applied upon a primary employer only at the segment of his operations at which the immediate dispute arose." *In re Retail Clerks etc. AFL-CIO (Montgomery Ward), 122 NLRB 1264.* State courts at common law uniformly so hold. See Annotation: "Picketing by employees of a plant where labor dispute exists, at an-

other plant of employer where there is no labor dispute", *37 ALR 2d 687 (1954)*.

3.

The "Reserved Gate" and INTERNATIONAL RICE MILLING cases

This Court has recognized the importance of a related problem in its grant of certiorari this term in No. 321, *International Union of Electrical Workers etc. v. NLRB*, involving picketing of a "reserved gate" of a primary employer. The instant case is even stronger, for here union picketed only the single gate used *in common* by primary employer and others. In *Electrical Workers* the picketing in issue was *only* at the gate reserved for employees of "secondary" employers. If such picketing is lawful, *a fortiorari*, the instant picketing is proper. If the *Electrical Workers* case is decided against the union, there yet remains open the questions here presented.

This case, like the *Electrical Workers* case, poses the question raised and partially answered in *NLRB v. International Rice Milling Co., Inc., 341 U. S. 665, 71 S. Ct. 961*: Is the proscription in §8(b)(4) (hence also §303) applicable to inducement of employees of neutrals to engage in concerted stoppage at the site occupied by the primary employer, in view of the protection of the right to strike contained in §13 of the Act? This Court held that

> "A union's inducements or encouragements reaching individual employees of neutral employers only as they happen to approach the picketed place of business *generally are not aimed at concerted, as distinguished from individual*, conduct of such employees. Generally

therefore, such actions do not come within the proscription of §8(b)(4), and they do not here." *341 U. S. 665, 671* (Emphasis added).

Does the reach of §13 there enunciated include picketing of the primary employer at all places where he does business, especially business closely related to the activity of the bargaining unit which is on strike? This question was expressly answered by the Eighth Circuit in the *SITE Oil* case *(249 F. 2d 332, 336-338)*, which held that "where lawful picketing in support of a valid primary strike is in progress against the primary employer at the employer's premises [albeit when such premises are occupied by employees of neutral employers only], the 'an object' test, applied by the Board is too narrow, and there should be evidentiary support for a conclusion that the primary picketing serves no lawful purpose." The Court there noted that the picketing throughout had the same purpose, to-wit, "obtaining of collective bargaining rights from the primary employer."[18]

In view of the conflict among the Circuits, it is of vital concern to all in the field of labor management relations that the Supreme Court indicate the extent of the *International Rice* rule.

B.

The Right of Free Speech

Even more important than conflict, is the devastating importance of a holding which limits laborers in dispute

[18] In the instant case, employers' own witnesses acknowledged that the purpose of the picketing at Champaign was "exactly the same" as at Memphis: "to give as many people, individuals [sic. *individually*?] at Champaign, Illinois, notice of that picket line * * *." (177a)

with a far flung corporation to protest at only that portion of the employer's enterprise where a strike is current. Such limitation upon "the workingman's means of communication" has grave constitutional implications.[19]

If the decisions below stand, union is foreclosed from advising those hired in Champaign, and about to be shipped to Memphis, that they are about to be misused by employer in a labor dispute, and it is foreclosed from advising individuals who approach the premises of the struck employer of its labor dispute. This raises serious First Amendment questions. While *Carpenters Union v. Ritters Cafe, 315 U. S. 722*, empowered restraint of picketing aimed at an industry which had no *nexus* with the primary dispute, this court was at pains to note that there had been no attempt "to protect other business enterprises of the building contractor, Plaster, who is the petitioners' real adversary. We need not therefore consider problems that would arise if [the State] had undertaken to draw such a line" *315 U. S. 722 at 727*. The instant case presents such "problem" with respect to the allowable area of free communication. We assert that to draw the free speech circle so narrowly as to encompass only one of a primary employer's many plants is to deny free speech.

C.

The Importance of the Picketing Issue

The use of §303 to insulate an employer from effective protest by his employees is an important, oft-recurring

[19]The picketing of Humko has at least some aspects of constitutionally protected free speech. *Thornhill v. Alabama, 310 U. S. 88; Chauffeurs, etc. v. Newell, d/b/a El Dorado Dairy, 356 U. S. 341.*

problem. NLRB (even in its conservative era) has refused to read the boycott sections as obliterating the Section 7 rights of concerted activity, including picketing.[20] See Appendix E, *infra*, p. A60. Yet the courts below read §303 to flatly prohibit picketing which was the only means by which potential strikebreakers could be advised—at the point at which they were hired—that they were about to be injected into a labor dispute at the point to which they were ostensibly being set for "training". For as we have detailed at p. 9, *supra*, the Champaign site was the Humko hiring situs, thus the one best place at which union could communicate with potential employees.

But entirely aside from the strong equities of the instant case, the problem is grave and widespread. Corporate enterprise meets the public at many places. Are workers to be deprived of a right to advertise grievances at primary employers' multitudinous places of business? Humko does not confine its business activity to Memphis, Tennessee. As a part of a two and one half billion dollar corporation it functions nationwide.[21] Employees in primary and legiti-

[20] See Appendix E, *infra*, p. A 60.

[21] Humko is a "Division" of National Dairy Products Corporation (516a, 205a, 310a) which has "some sixty or seventy operating divisions" 283a. See Moody's Industrial Manual, 1959, p. 2616, listing National Dairies' hundreds of plants throughout the nation; and noting its budget of over 57 million for capital expenditures in the current year.

Standard and Poor's, "Standard Corporation Descriptions" (1959), p. 2965, describes National Dairy Products corporation as "the largest unit in the dairy products field * * *" and continues:

"Under a plan of integration designed to improve efficiency and effect income tax savings, the company in 1956-57 took over and is operating as divisions the properties, businesses, and affairs of its former principal domestic subsidiaries."

(Then a list of wholly owned subsidiaries follows.)

Property—"Because of the nature of the business, numerous relatively small plants are operated in widely-scattered locations."

Net Value of property—$253,422,000 in 1958.

Net sales in 1958—$1,451,245,000.

mate dispute with such a monstrous corporate adversary should not be required to limit their protest to a small area while their antagonist operates nationwide, insulated from publication of employee protest. Any national corporation in dispute with its employees is enabled to draw on nationwide resources to win its labor dispute. Similarly employees are entitled to utilize constitutional and statutory rights of concerted activity and publication of their grievances at the points at which their adversary operates.

D.

The Damage Issues

This case presents questions regarding the proper measure of damages under Section 303 of the Act. There is serious need for guidance from this Court in the area of damages under §303. This Court has never indicated what is the measure of damage in such suits, though there has been much lower court litigation under this section of the statute.[22] Indeed, in the instant case divergent theories of damages were applied in the district and appellate courts. At the trial issues arose as to the propriety of specific damage award for such items as wages paid to workers who would not cross the picket line [Finding XXII(a), p. A52]; salaries to workers who did cross [Finding XXII(b), p. A53]; taxes on the picketed land [Findings XXII(g), p. A53]; premium pay for equipment rental [Finding XXIV

[22] *E.g. Mine Workers v. Patton (CA 4; 1954), 211 F. 2d 742; Osborne Mining Co. v. Mine Workers (DC Tenn.; 1959), 38 Labor Cases ¶65,741; Carpenters, Local 131 v. Cisco Construction Co. (CA 9; 1959), 266 F. 2d 365; Mine Workers v. Lambert, (CA 4; 1954), 214 F. 2d 487; Mine Workers v. Meadow Creek Coal Co. (CA 6; 1959), 263 F. 2d 52; Longshoremen v. Juneau Spruce Corp. (1952), 342 U. S. 237; Longshoremen v. Hawaiian Pineapple Co. (CA9; 1955), 226 F. 2d 875; Brick & Clay Workers v. Deena Artware, Inc. (CA 6; 1952), 198 F. 2d 637.*

(a), p. A54]). These, and other questionable items were held to be recoverable, contrary to our contention that such expenses were not proximately caused by the Champaign picketing.

The Court of Appeals ignored the question as to proximate cause, and held in effect that once picketing for unlawful purpose is shown it is proper to tax union a lump sum, even though its components are unascertainable. This view results in union paying for plaintiffs' gratuitous undertaking to pay bills tendered by others, but wholly unsupported (Finding XXIV, 698a); wages gratuitously paid to employees who refused to work during the picketing [Findings XXII(a), 695a; XXIV(b), 697(b)]; expenses of Pinkerton guards [Finding XII(c), 695a] though plaintiff acknowledged that it had not intended to increase the guard service, "that was Pinkerton's idea" (121a; Cf. 267a-268a); taxes on vacant land, where no building was even contemplated and where plaintiff admitted tax assessments would have been exactly the same regardless of the picketing. [Cf. Finding XXII(g), 696a; 277a, 278a, Cf. 213a.]

These, and many other items are specified in the trial court's findings as specific base for the enormous damage awards. Gross error in basing awards on such computations is apparent in some instances from the face of the trial court's findings. We will present detailed consideration of these in the event petition is granted. Passing reference to our brief in the Court of Appeals, pp. 35-38; 41-57, discloses the careful analysis of the trial court's damage findings and awards, which will be fully presented upon granting of petition.

II.

REASONS FOR GRANTING THE WRIT FOR INTERNATIONAL UNION

International is not liable for acts of local union

It has heretofore been generally held that a local union is an entity apart from the International union by which it is chartered, and that International is not liable for the unlawful acts of a local union absent proof of participation, authorization or ratification.

Yet in the instant case the Court of Appeals enunciates a new theory by which it is held that International occupies "a status of parenthood * * *" vis-a-vis the local union, and that such family status makes International responsible for the torts of the local of which International had knowledge, or should have had knowledge (p. 23a, *ff, infra)* .The specific holding is that "by its silence and inaction, the International, through Murtha acquiesced in and condoned the illegal activity of the Local Union at a time when there was full opportunity to step in and prevent such activity. Therefore the International is liable as a principal actor in bringing about a secondary boycott." (p. 25a, *infra*)

This doctrine (which finds no support in the International Constitution)[23] is flatly contrary to *Coronado Co. v. United Mine Workers, 268 U. S. 295, 299; United Mine Workers v. Coronado Co., 259 U. S. 344, 393; Morgan Driveway, Inc. v. Intl. Brhd. Teamsters, 268 F. 2d 871 (C. A. 7), cert. den. 361 U. S. 896; United Construction Work-*

ers v. Haislip Baking Company, 223 F. 2d 872 (C. A. 4), cert. den. 350 U. S. 874; DiGiorgio Fruit Corp. v. NLRB, 191 F. 2d 642 (C.A.D.C.); Pennsylvania Mining Co. v. United Mine Workers, 28 F. 2d 851 (C. A. 8), cert. den. 279 U. S. 841.[24]

In its administration of the National Labor Relations Act the NLRB has followed "the overwhelming weight of judicial authority * * * that a local union is a legal entity apart from its International and that it is not a mere branch or arm of the latter." *In re International Brotherhood of Electrical Workers (Franklin Electric Construction), 121 NLRB 143 at 146*, and the numerous cases there cited.

Quite aside from running counter to "the overwhelming weight of judicial authority", the decision below runs askew recently reiterated Congressional policy. The whole thrust of Title III of the Landrum-Griffin Act (Labor Management Reporting and Disclosure Act of 1959) 73 Stat. 519, 29 U.S.C.A. §401 et seq. at §461ff., is to pre-

[23]Portions of the Constitution are cited out of context in the Opinions below. The relevant provisions, ignored below, make clear that Teamster locals are autonomous. The Seventh Circuit is specific to this effect in holding this very International a separate entity from the local. *Morgan Driveway v. Intl. Brhd. of Teamsters, 268 F. 871 (C.A. 7).* The courts below ignored Article XII, Sec. 10 of the International Constitution which provides in effect that International shall not be responsible for strike or picketing damage occasioned by acts of a local union.

[24]Compare *Mile Branch Coal Co. v. United Mine Workers (D.C.D.C.), F. Supp. , 42 LRRM 2169 (May 1958); Azel Newman v. Sheet Metal Workers, 3 Utah 2d 377, 277 P. 2d 922; Ford v. United Brotherhood of Carpenters, 315 P. 2d 299 (Wash.); Harker v. McKissock, 7 N. J. 323, 81 A. 2d 480; DeMaio v. Local 80-A, United Packinghouse Workers, 29 N. J. Super. 541, 102 A. 2d 480; Seidner v. Fish, 131 Misc. 203, 226.*

serve the autonomy of the local union and limit the intrusion of the International in locals' affairs.[25]

Basic to responsibility is the right to control. Both judge-made and statutory law make clear the impropriety of international control of a local union except in narrowly defined circumstances not here present. And in the areas where such control is permissible it can be only after strict observance of procedural due process,[26] in strict conformity with the International Constitution,[27] and in accord with both the procedure and substance of Title III of the new Act.

The thrust of both the common law and the legislatures is to limit control from afar, and rely upon the autonomous judgment of the local members to control the local union. The instant opinion requires the very opposite. For if International treasuries are to be raided because Interna-

[25] See Senate Labor Committee's Report, 86th Cong. 1st Sess., Senate Report No. 187, p. 17, which discloses that the Congress "acted favorably upon the recommendation that there should be a limitation upon the right of internationals to place local unions in trusteeship."

[26] Under the International Constitution, the International had no authority to step in summarily and order the cessation of picketing at Champaign. The trial court's holding that "the International controls locals and their membership through the provisions relative to trials and appeals of local officers and members," (694a) is itself a contradiction of the alleged control by the International, for Article XVIII, Section 1(a) of the International Constitution provides that such trial be "by the *local union* Executive Board." (Emphasis added.) The appellate system providing for review by units of the International on appeals from aggrieved members is of course no evidence of control of the local by the International, such review being comparable to judicial review. The actual power to make decisions in strike situations, especially when the International is not paying strike benefits, rests entirely with the local, and International control exists only through the extreme device of trusteeship, which device can be used only in accordance with constitutional procedures designed to provide due process for members of the local.

[27] The International Constitution (314a, Exhibit A), especially Article XXI entitled *Local Unions*, and Article XXIII providing Rules of Order for Local Unions, makes it redundantly clear that a local union makes its own laws, elects and removes its own officers through the exercise of democratic decisions by the local membership only.

tional unions occupy the "status of parenthood", obviously the International parent must control and discipline the recalcitrant offspring. Recent trends have been in the direction of assuring even less "control" by International and more "democracy" and "autonomy" at the local level. A decision which reverses this trend is of extreme importance.

The constitutions of almost all International unions contain provisions comparable to those mentioned by the court below (A9-A12, A25) as demonstrating the "status of parenthood" which spells liability. This case thus affects not just the Teamsters International,[28] but the labor movement.

---

[28]A much narrower version of this question was refused review in *International Brotherhood of Teamsters, etc., et al. v. U. S., 275 F. 2d 610, C.A. 4, cert. den., 362 U. S. 975*, where International was held jointly responsible for acts of an agent of a local union which was being operated under International supervision by a trustee appointed by the International Union. Supervision had been imposed under Article VI, Sec. 5(a) of the International Constitution by which a temporary trustee is empowered "to take charge and control of the affairs of such Local Union". Here the local is autonomous.

CONCLUSION

WHEREFORE, petitioners pray that writs of certiorari be granted, and that upon final hearing the judgments below be reversed.

Respectfully submitted,

L. N. D. WELLS, JR.,
CHARLES J. MORRIS,
1601 National Bankers Life Building,
Dallas 1, Texas.

DAVID PREVIANT,
511 Warner Theatre Building,
Milwaukee 3, Wisconsin.

ANTHONY J. SABELLA,
Suite 1401 Columbian Mutual Tower,
Memphis 3, Tennessee,
Counsel for Petitioners.

May 5, 1961.

Of Counsel:

MULLINAX, WELLS, MORRIS & MAUZY,
1601 National Bankers Life Building,
Dallas 1, Texas.

GOLDBERG, PREVIANT & COOPER,
511 Warner Theatre Building,
Milwaukee 3, Wisconsin.

APPENDIX A

Nos. 13896-7-8

United States Court of Appeals

FOR THE SIXTH CIRCUIT

LOCAL UNION 984, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, AFL-CIO, an unincorporated labor organization, et al., *Appellants*,

v.

THE HUMKO COMPANY, INC. (A Division of National Dairy Products Corporation), *Appellee*.

LOCAL UNION 984, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, AFL-CIO, an unincorporated labor organization, et al., *Appellants*,

v.

RALPH KENT PHILLIPY, et al., *Appellee*.

LOCAL UNION 984, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, AFL-CIO, an unincorporated labor organization, et al., *Appellants*,

v.

KUHNE-SIMMONS COMPANY, INC., An Illinois Corporation, *Appellee*.

APPEAL from the United States District Court for the Western District of Tennessee, Western Division.

Decided February 15, 1961.

Before MCALLISTER, Chief Judge; POPE, Circuit Judge, and THORNTON, District Judge.

THORNTON, District Judge. This is an appeal from three judgments entered by the District Court in three cases consolidated by the Court and tried to the Court. Plaintiff HumKo Company, Inc., hereinafter called "HumKo" recovered a judgment in the amount of $57,013.05. Plaintiff Ralph Kent Phillipy, et al., hereinafter called "Phillipy" recovered a judgment in the amount of $11,264.73. Plaintiff Kuhne-Simmons Company, Inc., hereinafter called "Kuhne" recovered a judgment in the amount of $29,358.52. These judgments were recovered by each of these plaintiffs except HumKo against the same defendants, International Teamsters Local 984 of Memphis, Tennessee, and International Teamsters Union and certain agents and representatives of each, namely, R. A. Farrell as president of Local 984, and Francis J. Murtha as international or field representative of the International Union. HumKo's judgment was against International Teamsters Local 984 of Memphis, Tennessee, and International Teamsters Union. The complaints alleged violations of Section 303(a) of the Taft-Hartley Act, 29 U. S. C. A. § 187, which section prohibits secondary boycotts. (See Appendix, page 1, where this section of the statute is set forth in full.) Recovery of the damages sustained and of the costs of the suits was sought. The causes of action in the three suits were the same, except for the variations in the actual damage figures.

The appellants have submitted what they consider to be the proper questions for review on this appeal. The appel-

lees have submitted a counterstatement of what they consider to be properly before the Court on this appeal. The two sets of questions are not in accord. For the purpose of completeness in this opinion, we include the two statements above referred to in the appendix attached hereto. We here state, however, that we believe the questions as submitted by the appellants are so phrased as to result in the invasion of the province of this Court by predetermining that the findings of the Trial Court are clearly erroneous. After an analysis of a rather extensive record, we recognize the counterstatement of questions presented by appellees as being a proper statement of the matter before us for determination.

The District Judge made detailed findings of fact which we summarize:

SUMMARY OF THE FINDINGS OF FACT

The HumKo Company, Inc., a Tennessee corporation, was a division of National Dairies with its plant on Thomas Street in Memphis, Tennessee, where its normal business was the manufacturing, selling and distribution of edible fats and oils; D. R. Phillipy & Sons Company had its principal place of business at Memphis, Tennessee, and was a mechanical contracting firm; Kuhne-Simmons Company, Inc., was an Illinois corporation with its principal office located at Champaign, Illinois, and was engaged in the general construction business; Local Union 984, International Brotherhood of America was an unincorporated association organized and existing for the purpose, among other things, of representing employees in collective bargaining

with their employers. It maintained its office and place of business in Memphis, Tennessee, and did business regularly within the jurisdiction of the District Court. The defendant, R. A. Farrell, was a resident of Tennessee, was president and chief executive officer of Local 984; he was sued in his representative capacity; Local 984, as a labor organization, was subject to the Labor-Management Relations Act; the defendant International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America was an international labor union organized as an unincorporated association composed of subordinate affiliated local labor unions located throughout the United States, of which Local 984 was one. The International had its headquarters and principal place of business in Washington, D. C. It conducted business regularly within the jurisdiction of the District Court below, through its member, Local 984, and through its agent or representative, Francis J. Murtha, who was a resident of Memphis, Tennessee. Murtha was sued in his representative capacity only. The International was a labor organization subject to the Labor-Management Relations Act.

Murtha, on July 12, 1957, was an organizer for the International Union with his headquarters in Memphis, Tennessee, his duties covering ten southern states, including Tennessee. Such duties were general and were assigned to him by the president of the International or by someone else in authority. They were to make investigations, to assist in negotiations, to conduct elections, to manage trusteeships, to attend hearings, and to consult with officers of local unions with respect to organizing various groups of employees.

Murtha transacted business on behalf of the International in the Local 984 headquarters in Memphis, Tennessee, where he had a desk, use of the telephone and of secretarial service; Local 984 was, on July 12, 1957, the certified bargaining agent for the Production, Maintenance and Drivers hourly paid employees of the Thomas Street plant of HumKo. Farrell and Kuhns, as officers of Local 984, attended and participated in collective bargaining negotiations with officials and representatives of HumKo to secure a contract for the Production, Maintenance and Drivers hourly paid employees of the Thomas Street plant of HumKo. This took place before, during and after the period of picketing at Champaign, Illinois. Murtha attended and took an active part in several of these collective bargaining meetings with the officials of HumKo and the officers of Local 984. On one occasion at least, Murtha was the only representative participating in such collective bargaining negotiations with officials of HumKo. At all times during these negotiations and during the period Murtha was so engaged, his sole and only occupation was as International organizer. He was receiving his regular salary from the International. He received no form of payment from Local 984 for his services.

Only July 8, 1957, during the negotiations between Local 984 and HumKo, a picket line was placed at the Thomas Street plant of HumKo. On July 12, 1957, a labor dispute existed between HumKo and Local 984.

In the latter part of 1956, HumKo had entered into a contract with Phillipy and Kuhne, as independent contractors, for the construction of a plant to be known as the Mid-

west Refinery of HumKo at Champaign, Illinois, which is about 400 miles from Memphis, Tennessee. This plant, when completed, would produce edible fats and oils. On July 12, 1957, in furtherance of this contract, Phillipy and Kuhne were engaged in the construction of this plant, and no employees of HumKo did any work of any kind or nature on such construction. No employee or official of HumKo gave instructions or directions to any of the employees of Phillipy, Kuhne or to any other contractor or subcontractor engaged in this construction. On the 12th day of July, 1957, both Phillipy and Kuhne had many of their own employees working on this construction, all of whom were labor union members; Phillipy and Kuhne, as independent contractors, also had several subcontractors performing work and services on this job, and all such employees were also members of various labor union organizations. As of July 12, 1957, neither Phillipy nor Kuhne had any labor dispute with Local 984, nor with any other labor organization or union—local or international—and the same is true of every other contractor, subcontractor and/or employee working on the job as of that date.

The construction site of Midwest Refinery was wholly enclosed by a wire cyclone fence, and the entrance gate to the construction site was a wire cyclone gate on Mattis Road, where all of the employees of Phillipy and Kuhne, and the other contractors and subcontractors entered upon the construction site. On July 12, 1957, the construction of the Midwest Refinery was approximately 65-75% completed, but neither the possession of the whole plant, nor of any part of it, had been turned over to HumKo on this date; the only

employees of HumKo at the construction site were salaried, advisory and engineering employees.

There were no Production, Maintenance and Drivers hourly paid employees of HumKo at this construction site;

the machinery for the manufacturing of edible fats and oils was not yet installed at the HumKo plant at Champaign;

no raw materials for the manufacturing process of edible fats and oils were on the job site; and no edible fats and/or oils were being manufactured, sold or distributed at the Midwest Refinery of HumKo at Champaign.

All of these facts were known to the agents and officers of Local 984, and to the local agent of the International.

On July 11, 1957, an officer and agent of Local 984, accompanied by several striking HumKo employees, attended a meeting of business representatives of various unions at the meeting place of the Champaign Trades and Labor Council. This officer and agent requested them and their unions to instruct their members not to cross the picket line and not to do any work for their neutral contractor employers who were in the process of constructing the HumKo plant. He also told them that they would be very poor union members if they did not respect the picket line and that, notwithstanding any advice to the contrary, he was going to set up a picket line on the following morning. On the morning of July 12, 1957, pickets from Local 984, who had been brought from Memphis, Tennessee, by an officer of Local 984, formed a picket line at the entrance gate of the Midwest Refinery of HumKo at

Champaign. They carried placards bearing this legend: "Production, Maintenance and Driver Employees of The HumKo Co., Inc., Memphis, Tennessee, ON STRIKE for better wages & working conditions . . . Members of General Drivers, Salesmen and Warehousemen's Local Union No. 984, AFL." These pickets maintained said picket line continuously until the late afternoon of July 23, 1957. The purpose of the picket line was to stop construction work at the Midwest Refinery of HumKo, at Champaign. On July 12, 1957, the employees of Phillipy, Kuhne and of the other contractors and subcontractors engaged in this construction work appeared for work but none of these employees crossed the picket line on this date for the purpose of working on such construction, nor did they do so on any subsequent working day, during the time that the picket line was maintained. No construction work of any kind was done from the morning of July 12, 1957, until the morning of July 24, 1957, by any of the employees of Phillipy or Kuhne, or of any other contractors or subcontractors engaged in this project. These contractor employers on the job (who were secondary neutral employers) were thereby forced to cease doing business with HumKo.

On July 15, 1957, while a picket line was being maintained at the HumKo plant at Champaign, a collective bargaining meeting was had in Memphis, Tennessee, between Local 984 and officials of HumKo, at which it was stated, in substance, by a HumKo official, that further negotiations were being made more difficult because of the maintenance of the picket line at the HumKo plant at Champaign. Francis J. Murtha,

the International organizer, was present at the meeting when this statement was made, but he made no objection to, nor repudiation of such statement or fact, on behalf of the International. During the maintenance of the picket line at Champaign, Local 984 was assured by R. A. Farrell, its president (in a statement by him at a Local Union meeting) that the International was 100% behind the Local.

On July 15, 1957, Kuhne filed with the National Labor Relations Board at Chicago a complaint charging Local 984 with setting up and maintaining a picket line at the Midwest Refinery of HumKo at Champaign. It further charged that such picket line encouraged and induced the employees of Kuhne to engage in a strike or concerted refusal to work or perform services in the course of their employment, the object being to force Kuhne to cease doing business with HumKo. On July 23, 1957, a settlement agreement of this complaint was effected by Local 984, Kuhne and the Regional Director of the National Labor Relations Board at Chicago. Thereafter Local 984 caused the picket line at the Champaign plant to be withdrawn.

There was a complete stoppage of all construction work from July 12, 1957 to July 23, 1957, at the site. Construction work was resumed on the morning of July 24, 1957, but such resumption was not normal, nor was there a normal number of employees back on the job until approximately two weeks after July 24, 1957.

The defendant International functions under a written constitution, and is comprised of an unlimited number of

local unions. One of the objects of the International is to organize all workers under one banner, and to educate them to cooperate in every movement which tends to benefit the organization. All members of the local unions are members of the International and the International approves or disapproves all contracts entered into between its members and their employers. The general president of the International has full power to determine who shall be members of the International, which determination is binding on the locals. The general president (a constitutional officer of the International) settles and determines all grievances and disputes submitted to him by joint councils and local unions. Whenever the general president makes a decision, or orders a local union to observe the union laws, and the local refuses to do so, the International may suspend or revoke the charter of the local. The by-laws of local unions are subject to the approval of the general president. The general president may appoint a trustee to take charge and complete control of the affairs of a local union. The trustee's acts are subject to the supervision of the general president and he may remove trustees at any time, and may appoint successor trustees. He may, in his discretion, restore self-government to a local union. The general president, when he deems it for the best interests of the International (which is composed of local unions), is empowered to remove any International organizer.

The charters of all local unions remain the property of the International. It may demand and receive the charter of any local at any time, and upon surrender of the charter all property of the local, including money on hand, becomes

the property of the International. The local must secure office supplies from the International. The International may control membership of the local. The International possesses power to assess local members and assess per capita taxes. The International controls secretary-treasurers of local unions, even to the extent of directing the increase and decrease in the amount of bonds to be furnished by such officials. The International has complete authority to audit the books of all locals. Before a local union is allowed to become involved in a strike, lockout, boycott, lawsuit or any serious difficulty such local union must immediately notify the joint council, of which it is a member, of the nature of the difficulty and of the action contemplated. The joint council then takes steps to approve or disapprove such contemplated action. The joint council then notifies the general president of the steps it has taken with respect to the proposed action. The general president is authorized to approve, disapprove, or modify the action of the joint council. Any local desiring to present a wage scale to its employers first submits a copy of the same to the joint council, if one exists in its city or vicinity. Should the same receive approval by the joint council, it is compulsory upon the local union to forward a copy of such wage scale to the general president for his approval before it is presented to any employer. The general president has the power to inquire into conditions surrounding the local union and if, in his judgment, conditions do not warrant its presentation, he immediately notifies the local union of his decision in the matter. A copy of the wage scale must be in the hands of the general president at

least thirty (30) days before presentation to the employer. No contract entered into between a local union and any employer is valid and binding upon a local union until approved by the general president (unless approval thereof is at any time specifically waived by him or his representative).

The International general president has complete control over the by-laws of the joint council, and all locals must affiliate with a joint council, comply with its laws, and obey its orders. All local unions must affiliate with and participate in activities of conferences when and to the extent ordered by the General Executive Board (of the International) in its discretion.

The International controls locals and their memberships through the provisions relating to Trials and Appeals of Local Officers and Members. The International dictates and/or controls the conduct of the local in the administration of its business, who shall be the local's officers, the local officers' duties, and the rules of order for the conduct of local union meetings.

SUMMARY OF CONCLUSIONS OF LAW

The Trial Court concluded

that during the period of July 12-23, 1957, the plaintiffs were engaged in an activity affecting commerce;

that the defendants, Local 984 and the International, are labor organizations within the purview of, and subject to, the Labor-Management Relations Act;

that on July 12, 1957, the primary situs of the labor dispute between Local 984 and the International on

the one hand, and HumKo on the other, was at the Thomas Street plant of HumKo in Memphis, Tennessee;

that the placing of the pickets at HumKo's Champaign plant constituted a secondary boycott in violation of Title 28, U. S. C. A. § 187;

that the acts of Local 984, in sending pickets from Memphis, Tennessee, the situs of the primary employer, HumKo, to Champaign, Illinois, and in setting up a picket line at the construction site there, had the effect of inducing and encouraging the employees of Phillipy and Kuhne, secondary neutral employers, to strike or engage in a concerted refusal to work or perform services for Phillipy and Kuhne which, in turn, resulted in forcing Phillipy and Kuhne to cease doing business with HumKo;

that the International, by exercising control over Local 984, by virtue of its employees' (acting within the scope of their authority) participation in collective bargaining negotiations with the primary employers, and by instructing and directing the pickets at the situs of the secondary employer, had knowledge of, participated in and ratified the acts and conduct of its Local 984;

that thereby, with Local 984, the International established and maintained a secondary boycott at the Midwest Refinery of HumKo at Champaign, Illinois;

that the plaintiffs are entitled to recover all damages which flowed directly and proximately from the establishment of the proscribed secondary boycott, HumKo having suffered damage to its business in the amount of $57,013.05, Phillipy having suffered damage to its business and entitled to recover damages in the amount so suffered, and Kuhne having suffered damage to its business and entitled to recover damages in the amount suffered.

DISCUSSION

Under the provisions of Rule 52(a) F. R. C. P. this Court is bound by the findings of the fact of the Trial Court unless they are clearly erroneous. In applying this rule in *McAllister* v. *United States*, 348 U. S. 19, 20 (1954), the Supreme Court enunciated the following test:

> "A finding is clearly erroneous when 'although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.' *United States v. Oregon Medical Society*, 343 U. S. 326, 339; *United States v. United States Gypsum Co.*, 333 U. S. 364, 395."

In analyzing the findings of fact of the Trial Court below in the light of this standard as our test, a review of some of the testimony adduced at the trial is illuminating.

George Nesmith testified that he was a resident of the State of Illinois; that he was a member of the Painters' Union for 14 years; that on the 12th day of July, 1957, he was employed at the Midwest Refinery of HumKo, and that he and his group were in the process of spraying ceilings in the refinery; that prior to the 12th day of July he was foreman of the painters on the job and had 6 painters working under him; that on the 12th day of July he went to the Midwest Refinery for the purpose of going to work; that when he arrived at the gate of the plant he observed electricians, carpenters, bricklayers and steam fitters idling around the gate; that he talked to two men who were standing in the center of the driveway and asked them if he could get into the plant because he had paint in the spray

cans in the plant and the paint had to be cleaned out or it would be ruined; that they talked it over and told him that he could go in if he did not take anything in, but that he couldn't bring anything out; that he could go in and clean up the equipment and get out as quickly as he could, and that he hurriedly got the equipment clean and came right out past the gate; that of the 6 men who were working under him as painters none went to work on July 12, 1957, because it was against the union rules to go across the picket line; that he returned to the plant almost every day for around 12 working days after the 12th of July and until the 23rd of July, and he observed that there was no one going through the gate and that he saw pickets at the entrance gate; that none of the painters working under him did any work toward the construction of the refinery during the period between July 12 and July 23, 1957; that he took his orders on the job from the Superintendent of Kuhne-Simmons Company.

The same story, in broad outline, was told by the witness Ernest Smith, who was a resident of Urbana, Illinois, and employed at the Midwest Refinery at Champaign as a roofing foreman on July 12, 1957, and in charge of a crew of 5 men; also testifying to the same effect was William Paul, a resident of Champaign and employed by Kuhne-Simmons Company as one of 25 carpenters; Joe Vaughn of Champaign also testified that he was a masonry foreman heading a crew of 8 to 12 men, and his testimony paralleled that of Nesmith and Paul. The import of the testimony of these four witnesses is the same . . . men attempting to go

to work, confronted with a picket line and unable to cross the picket line because of union prohibition.

There was testimony by witnesses who were employed at the HumKo plant in Memphis, Tennessee. One of these, John Council, testified that he was working at the HumKo plant at Memphis, Tennessee, as a machine operator during the time when the strike was called at that plant, and at the time of his testimony he was still employed at the HumKo plant at Memphis, Tennessee; that he worked the picket line at the HumKo plant at Memphis during the progress of that strike; that he attended meetings of Teamsters Union Local 984 during the strike; that he also attended meetings of this Local after the pickets were withdrawn from the HumKo plant at Champaign, Illinois, these meetings being held also at Memphis, Tennessee, and he identified union officials present at the meeting as Mr. Farrell, Mr. Koppeis and Mr. Kuhns; that at the meeting in the union hall at Memphis, after the picket line had been withdrawn at Champaign, he heard a statement made by one of the three aforesaid officials of the Union that "they had to withdraw the pickets, they were against construction and not against HumKo employees" He further heard one of these union officials make the statement that the picket line would be reinstated in Champaign when the plant started producing.

Additional testimony by witnesses employed at the Memphis plant was given by James Monasco, an operator in the deodorizing department, by Norman Johnston, a truck driver, and by William Kean, a maintenance worker. Their

testimony was all of the same import and a composite of their testimony reveals

> that they participated in the strike conducted at the Memphis plant;
>
> that they heard particular union officials (naming them) state unequivocally that the strike at Champaign was to cause the cessation of the construction work there;
>
> that men were needed to go up to Champaign from Memphis to replace the pickets;
>
> that the picket line was effective in stopping the construction work;
>
> that the Local had 100% backing by the International;
>
> that the Local paid the expenses of the pickets imported to Champaign from Memphis;
>
> that when the picket line at the Champaign plant was withdrawn the union officials were satisfied there would be at least a 5-month delay in the resumption of construction of this plant because of the disbursement to all parts of the country of the contractors and employees occasioned by the picketing;
>
> that there was no effort made to prevent HumKo employees in the category of office workers and engineers from entering the plant . . . no effort, in other words, to engage in primary picketing.

From the contents of the foregoing, together with a detailed examination of *all* of the evidence, this Court "is left with the definite and firm conviction" that no "mistake has been committed,"[1] that there is substantial evidence to support the findings of the Trial Judge, and to satisfy us that the object or purpose of the picket line at

[1] *McAllister* v. *United States*, 348 U. S. 19, 20 (1954) supra.

the Midwest Refinery of HumKo at Champaign, Illinois, from July 12, 1957, to July 23, 1957, was to stop construction work on this refinery, and that this objective was achieved as a result of the picketing operation. The picketing brought about a complete stoppage of all construction work from July 12 up to and including July 23, 1957, at the construction site. True it is that there exist conflicts in the testimony when a comparison is made of the testimony of the witnesses on direct examination with that developed on cross-examination, but such conflicts are for resolution by the trier of the facts. *(Akron Dry Goods Company* v. *Commissioner of Internal Revenue*, 218 F. 2d 290 (6 Cir., 1954).

There is substantial evidence that when the union officials at Memphis sent their union members from Memphis to Champaign they did not have primary picketing as an objective. This is bolstered by evidence to the effect that there was neither intention nor effort to exert pressure of any kind upon the salaried, supervisory and engineering employees of HumKo at Champaign and that, in fact, no pressure was exerted upon them,—they were free to come and go as they pleased.

It is not disputed that as of July 12, 1957, the plant was in the process of construction, and that it was not in production. This serves to support the theory that there could not have been lawful primary picketing at this plant. Since the plant was in the process of construction, it would not have been possible for a production schedule to have been in operation.

The agreement to furnish all labor and material, and for the installation and erection of the Midwest Refinery of HumKo Company at Champaign, Illinois, was executed between the HumKo Company, a Tennessee corporation, as the owner, and the Kuhne-Simmons Company, Inc., an Illinois corporation, as contractor, under plans and specifications prepared by Kraft Foods Company Engineering Departmen Howard A. Tonsager, Architect, of Chicago, Illinois; this contract further providing that "All work shall be performed in accordance with instructions of Architect's Superintendent or Executive Engineer subject to the provisions of Paragraph 3 hereunder." Paragraph 3 is as follows:

> "The Owner may at any time and from time to time during the progress of the work, without in any way rendering void the contract, order alterations in, additions to, or deductions from the work, and when so ordered in writing the Contractor shall promptly proceed with such changes without causing delay."

The contract further provides:

> "Payment of the remaining ten percent (10%) of such request shall be made within thirty (30) days after the completion of all work and final acceptance by the Owner of all materials and workmanship in accordance with the terms of this contract; . . ."

The completion date specified in this construction contract is covered by the following provision:

> "The Contractor agrees to commence work hereunder promptly, to prosecute such work diligently and to complete all of such work in accordance with said plans and specifications and the terms hereof on or before August 16, 1957."

As senior vice president of the HumKo Company, J. H. Kirby testified that he was in charge of production and research for the entire HumKo division, and that the Midwest Refinery plant of the HumKo Company began production on a limited basis in the first week of January 1958.

The appellants cite extensive authority for the proposition that picketing of a primary employer, at a place of business of the primary employer (even though not the situs of the dispute) is legitimate, even though the effect of such lawful picketing is to induce employees of others engaged on the same site to refuse to cross the picket line. In appellants' letter memorandum of February 5, 1960 to this Court, they further contend that "assuming *arguendo* that it was the union's intent to induce or encourage the employees of the contractors to engage in a concerted refusal to work, so as to require the contractors to cease doing business with National HumKo, then our answer is still that *such conduct is legal because it occurred at a situs owned, occupied and controlled by the primary employer and is protected conduct under Section 13 of the Act.*" As authority for this they cite *Local 618, Automotive Petroleum, etc., Union v. NLRB (Site Oil)*, 249 F. 2d 332 (8 Cir., 1957); and *Seafarer's Union* v. *NLRB (Salt Dome)*, 265 F. 2d 585 (D. C. Cir., 1959).

In analyzing all of the authority to which the appellants have referred, and in attempting to apply it to the facts as they appear in this controversy, we can only say that we take no issue with appellants' citations, and would readily apply them if we had under consideration a factual situa-

tion which fitted into the mold of the citations. We fail to recognize comparable situations between the facts here and those present in the cases upon which appellants rely.

Of the Taft-Hartley Act, the Supreme Court has said that it

> "was designated to protect the public interest, but not in the sense that the public was to be shielded from secondary boycotts no matter how brought about. Congress' purpose was more narrowly conceived.
>
> It aimed to restrict the area of industrial conflict insofar as this could be achieved by prohibiting the most obvious, widespread, and, as Congress evidently judged, dangerous practice of unions to widen that conflict; the coercion of neutral employers, themselves not concerned with a primary labor dispute, through the inducement of their employees to engage in strikes or concerted refusals to handle goods." *Local 1976, United Brotherhood of Carpenters and Joiners of America, A.F.L., et al.* v. *National Labor Relations* Board, 357 U. S. 93, 100 (1958).

In our consideration of the various facts relative to the category of the picketing at the Champaign plant of HumKo—whether it was primary or secondary—the following picture has presented itself:

> An owner of a piece of property who has contracted with a general contractor to install and erect a building, including the furnishing of all labor and material, for the price of $1,942,471, with the right of supervision in the architect;
>
> a completion date of August 16, 1957;
>
> a provision for final acceptance by the owner;
>
> a work stoppage preventing construction of the building brought about by a picket line transported 400

miles to the site for the express purpose of delaying construction at a time when construction was only 75% completed, the owner of the property being a primary employer of employees at its plant in Memphis;

a labor dispute at the Memphis plant and failure of the Local to petition for bargaining rights at Champaign;

picketing inaugurated at a time when the possession of the plant was still in the general contractor pursuant to the provisions of the construction contract;

a 12-day work stoppage (resulting in a construction delay) at a time approximately six months before the owner of the plant began production (limited) in the normal operation of its business;

no labor dispute being in existenc between the contractor and/or subcontractors and their employees;

the picket line being the cause of the refusal of the employees to continue work;

the Union, in fact, inducing and encouraging the employees of the general contractor and of the subcontractors to engage in a concerted refusal to perform the services for which they were employed;

the object of such action (clause above) being to force the general contractor to cease doing business with the owner.

This picture presents a form of picketing that has been determined by this Court in *United Brick & Clay Workers v. Deena Artware, Inc.*, 198 F. 2d 637, 642 (6 Cir., 1952), to have "extended beyond the limits of primary picketing and constituted a secondary boycott through pressure on the general contractors" and to have been "in violation of § 303 (a) (1) of the Labor Management Relations Act here-

inabove set out." (See Appendix for text of 303 (a) (1), 29 U. S. C. A. § 187.)

The International Union, as appellant, additionally contends that it did not participate in, authorize, or ratify, or otherwise engage in such conduct as to become liable for the acts and conduct of the appellant Local 984, or the agents, or any member of this Local; whether the International Union is liable depends upon the conduct and/or activity of Francis J. Murtha who, during the period involved in this controversy, identified himself as a general organizer of the International Union living in Memphis, Tennessee, who made use of a desk and telephone in the office of Local 984, and who also used his home as an office, and whose duties during the year 1957 were those of a union investigator and negotiator, and worker in the preparation of arbitration cases. He testified that during the year 1957, Local 984 did not request approval, sanction, or assistance from the International in connection with the strike against HumKo. The testimony further established:

> that Murtha, in his capacity as a representative of the International Union, participated in negotiations with HumKo to assist members of Local 984;
>
> that Murtha's participation in this respect was prior in time to the picketing at Champaign, continued through such period, and was still going on when the pickets were withdrawn from the plant at Champaign by the Union;
>
> that Murtha had actual notice that picketing was going on at Champaign while the building was under construction;

that he had actual knowledge of a complaint filed with the National Labor Relations Board in Chicago by a neutral employer at Champaign, in relation to the picketing of the construction job by the union pickets.

It is not unreasonable to believe that before embarking on a 400-mile trip with a group of union members for the purpose of a picketing operation, the officials of the union would, in preparation for such a trip, make inquiry as to the situation at the site where they would commence the picketing before they authorized such an undertaking. There is nothing "wildcat" about a 400-mile trip taken by a group of adults, with a union official in charge. In preparing for this trip the officials of the union knew, or should have known, that the picketing was going to take place at a plant that was under construction—not completed—and not in production. The officials who were in a position to know of the conditions that would confront the pickets at the end of the 400-mile trip included Mr. Murtha, because of his close association with Local 984, as a representative of the International Union.

It is unrealistic to believe that Mr. Murtha, as a paid investigator for the International Union, would not have had facts in his possession which were indicative of a clear-cut violation of a mandatory provision of the constitution of the International Union—that Local 984 was becoming involved in a boycott (Champaign) and in a lawsuit (with the neutral employer and the National Labor Relations Board at Chicago) without giving the Joint Council immediate notice, and thus indirectly the General President of the International Union, of the contemplated

action, or of the serious difficulty (the lawsuit). Mr. Murtha would further have us believe that he stood idly by, as a paid investigator of the International Union, and did not make this violation known to his superiors in the International Union.

The dominion exercised over the Local Union by the International, as evidenced by the constitutional requirements previously set forth in the summary of the findings of fact, as well as by many other provisions of the constitution, establishes a status of parenthood that brings the local union into the family by depriving such local union of that degree of independence associated with, and a necessary ingredient of, an autonomous organization. Since Mr. Murtha, as the representative of the parent organization, was an active participant in the activities of the Local at Memphis, and since the secondary boycott at Champaign was conceived in the environment surrounding Mr. Murtha (at Memphis), he and his principal, the International, knew, or should have known, of the secondary boycott in Champaign. By its silence and inaction, the International, through Mr. Murtha, acquiesced in and condoned the illegal activity of the Local Union at a time when there was full opportunity to step in and prevent such activity. Therefore the International is liable as a principal actor in bringing about a secondary boycott. It is impossible for it to have been as close to the affairs of Local 984, through the participation of Mr. Murtha, its agent, without its being a part of the activity of the Local. Certainly, from Mr. Murtha's dealing with Local 984 in the negotiations with HumKo

in the labor dispute (out of which the secondary boycott at Champaign was conceived), the Trial Court had before it substantial basis for the conclusion that the International did participate in, authorize, and ratify the actions of the Local in this boycott. It did, through Mr. Murtha, acting within the scope of his authority as an International representative, engage in a course of conduct in such a manner as to become liable for the actions of Local 984, and its agents, in the maintenance of the picket line at the HumKo plant at Champaign. Furthermore, the Trial Judge had the opportunity to see and hear the witnesses and was therefore in a position to appraise the credibility of each of them.

The appellants contend that, even if liability for the secondary boycott is chargeable to them, the damages found by the District Court are excessive, and are not supported by competent evidence (with the exception of the claims by Phillipy).

We are of the opinion that the three judgments which are the subject of this review are supported by substantial and sufficient evidence, which also supports the findings and conclusions of the Trial Judge, that the International Union and Local Union 984 (in all three cases), as well as Farrell and Murtha (each in his representative capacity only), in Cases Nos. 3254 and 3255 are jointly and severally liable to the plaintiffs for the damages entered by the District Court, subject to the modifications hereinafter set forth.

Responsible officials of HumKo testified as to losses sustained by that company through the work stoppage brought about by the secondary boycott; Mr. Kuhne, of Kuhne-Simmons Company, who had a background of 30 years as a contractor, testified as to the reasonableness of the charges for equipment that was idled by the work stoppage. He also identified all other losses sustained by his company as losses resulting directly from the illegal work stoppage sponsored by the appellants. In *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U. S. 555, 562, 563 (1931), there is stated the following:

> "It is true that there was uncertainty as to the extent of the damage, but there was none as to the fact of damage; and there is a clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damage, and the measure of proof necessary to enable the jury to fix the amount. . . .
>
> • • •
>
> "Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts. In such case, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate. The wrongdoer is not entitled to complain that they cannot be measured with the exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise."

The appellants challenge the validity of the Trial Court's award of attorney fees as an element of damages in each of the three claims. The appellees reply by stating that this question has been determined in their favor in *International Longshoremen's Union* v. *Juneau Spruce Corp.*, 189 F. 2d 177 (9 Cir., 1951), and in *International Longshoremen's Union* v. *Hawaiian Pineapple Co.*, 226 F. 2d 875 (9 Cir., 1955). An examination of these opinions discloses that neither of them is authority for allowing attorney fees to any of the prevailing parties as an item of damages sustained by reason of the illegal work stoppage at the plant at Champaign. The general rule in relation to awarding damages for attorney fees is "Attorney's fees can ordinarily be obtained by a prevailing party against an adverse party only by virtue of: 1. A statute or rule of court, or 2. The provisions of a written agreement or contract." *Standard Accident Ins. Co. of Detroit, Mich.* v. *Hull*, 91 F. Supp. 65, 66 (1950).

The $1,000 attorney fee paid by HumKo in assisting Kuhne in the removal of the picket line at Champaign, as well as the $1,000 attorney fee paid by Kuhne in filing the charge with the National Labor Relations Board to bring about the removal of the picket line so that they could proceed with the completion of the construction contract, are proper items of damage.

Counsel have not cited, nor are we familiar with any applicable statute, rule of court or provision of any written

agreement or contract that authorized the Trial Court to award attorney fees as an element of damages.

Mr. J. H. Kirby, as senior vice president of HumKo, testified under cross-examination as follows:

> "Q. Now, you say all of these employees that we are talking about, the so-called trainees, spent a week idle in the hotel? I believe you were clear on that, right?
>
> "A. Mr. Morris, when the strike started, I told the men to go to the hotel and stay.
>
> "Q. All right.
>
> "A. And exactly the number of days, I don't know, but I believe for practically all of the first week that almost all of them did stay in the hotel. It was about a week later that those fellows, of their own accord, decided to come back.
>
> "Q. There was then an interruption in their training [435] as a result of the strike here in Memphis; is that correct?
>
> "A. That's right, a few days.
>
> "Q. That interruption had nothing to do with the picketing in Champaign, did it?
>
> "A. So far as those few days are concerned, no."[2]

From the foregoing testimony it is impossible for this Court to determine just what days the trainees were idled, and it is further impossible for us to determine from any of the testimony, or from the exhibit that itemizes the alleged damages of HumKo resulting from the secondary boycott, whether the time lost by the trainees, as well as their ex-

[2]Appendix 305a, Joint Volume I, filed with this Court as part of this appeal.

penses during this period, as a result of the strike at Memphis (which strike had nothing to do with the picketing at Champaign), are included in the award of damages to HumKo. If so, an adjustment of the award should be made by the Trial Court.

As a result of our review of this case, as set forth in the preceding observations and analysis

Case No. 13896 is remanded with instructions that the award of damages be adjusted by withdrawing the $5,000 attorney fee as an item of damage, and that consideration be given to an adjustment in the award of damages in the event it is determined that the time and expenses of the trainees at Memphis, who were idled as a result of the Memphis strike, are included in the total award. In all other respects this judgment of the District Court is affirmed.

Case No. 13897 is remanded with instructions that the award of damages be adjusted by withdrawing the $3,500 attorney fee as an item of damage. In all other respects this judgment of the District Court is affirmed.

Case No. 13898 is remanded with instructions that the award of damages be adjusted by withdrawing the $5,000 attorney fee as an item of damages. In all other respects the judgment of the District Court is affirmed.

This case is hereby remanded to the District Court for proceedings not inconsistent with the views expressed herein.

APPENDIX

Page

Section 303(a) of the Taft-Hartley Act—29 U. S. C. A. § 187 1

Questions for review on appeal, as submitted by appellants 3

Counterstatement of questions for review on appeal, as submitted by appellees 4

SECTION 303(a) OF THE TAFT-HARTLEY ACT 29 U. S. C. A. § 187*

29 U. S. C. A. § 187. "Boycotts and other unlawful combinations; right to sue; jurisdiction; limitations; damages.

(a) It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is—

(1) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any

*Not including the September 14, 1959, Amendment.

other producer, processor, or manufacturer, or to cease doing business with any other person;

(2) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

(3) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

(4) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class unless such employer is failing to conform to an order or certification of the National Labor Relations Board determining the bargaining representative for employees performing such work. Nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under subchapter II of this chapter.

(b) Whoever shall be injured in his business or property by reason or[1] any violation of subsection (a) of this section may sue therefor in any district court of the United States subject to the limitations and provisions of section 185 of this title without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit. June 23, 1947, 3:17 p.m., E. D. T., c. 120, Title III § 303, 61 Stat. 158."

QUESTIONS FOR REVIEW ON APPEAL, AS SUBMITTED BY APPELLANTS

"1. Under § 303(a) of the Taft-Hartley Law [29 U. S. C. A. § 187(a)], may a labor union, without regard to the 'situs' of its labor dispute, follow the primary employer to a site occupied by him together with secondary employers and publicize its dispute by picketing the primary employer at one of his places of business removed from the 'situs' of the dispute, where such picketing has the effect to induce employees of secondary employees to engage in work stoppage?

"2. Where certified Union's object is to require primary employer to bargain does the proviso to Section 303(a)(2) of the Taft-Hartley Act [29 U. S. C. A. § 187(a)(2)] permit union to induce employees of secondary employers to engage in work stoppage?

---

[1]So in original. Probably should read "of."

"3. Are the findings of the District Court with respect to (1) Appellees' activities at its place of business in Champaign, Illinois; and (2) Appellants' activities and purposes in Champaign, Illinois; 'clearly erroneous' within the meaning of Rule 52, F. R. C. P.?

"4. Are the District Court's findings and conclusions as to damages clearly erroneous?"

COUNTERSTATEMENT OF QUESTIONS FOR REVIEW ON APPEAL, AS SUBMITTED BY APPELLEES

"1. Did the appellants, International Teamsters Union, and International Teamsters Local 984 of Memphis, Tennessee, which were on strike against HumKo at its manufacturing plant at 1702 Thomas Street, in Memphis, Tennessee, its normal place of business, post pickets at a construction job in Champaign, Illinois, to induce the employees of independent contractor employers constructing that plant to engage in a concerted work stoppage with an object of the picketing being to force these contractor employers to cease performing their contracts with each other or with HumKo?

"2. Did International Teamsters Union expressly or impliedly, (or is it estopped to deny that it did), authorize, ratify, participate in or render guidance to its Local 984 in the strike and the use of picketing to induce the employees of independent contractors constructing a plant for HumKo at Champaign, to engage in a concerted work-stoppage, where an object of the picketing was to force these contractor employers to cease performing their con-

tracts with each other or with HumKo so as to make it liable to Kuhne-Simmons Co., Inc., for damages?

"3. Are the findings of fact by the District Court with respect to appellants' activities and purposes constituting a secondary boycott clearly erroneous on the evidence?

"4. Are the District Court's findings as to Kuhne-Simmons Co., Inc.'s damages clearly erroneous on the evidence?"

APPENDIX B

No. 13,896

JUDGMENT

February 15, 1961

APPEAL from the United States District Court for the Western District of Tennessee.

THIS CAUSE came on to be heard on the transcript of the record from the United States District Court for the Western District of Tennessee, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed, and the case remanded to the District Court for proceedings not inconsistent with the views expressed in the opinion herein.

Approved For Entry:

/s/ Thomas P. Thornton
United States District Judge
(Sitting by Designation)

A 37

No. 13,897

JUDGMENT

February 15, 1961

APPEAL from the United States District Court for the Western District of Tennessee.

THIS CAUSE came on to be heard on the transcript of the record from the United States District Court for the Western District of Tennessee, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed, and the case remanded to the District Court for proceedings not inconsistent with the views expressed in the opinion herein.

Approved For Entry:

/s/ Thomas P. Thornton
United States District Judge
(Sitting by Designation)

No. 13,898

JUDGMENT

February 15, 1961

APPEAL from the United States District Court for the Western District of Tennessee.

THIS CAUSE came on to be heard on the transcript of the record from the United States District Court for the Western District of Tennessee, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed, and the case remanded to the District Court for proceedings not inconsistent with the views expressed in the opinion herein.

Approved For Entry:

/s/ Thomas P. Thornton
United States District Judge
(Sitting by Designation)

APPENDIX C

Nos. 13,896-7-8

United States Court of Appeals

FOR THE SIXTH CIRCUIT

ORDER ON PETITION FOR REHEARING

Before: McAllister and Pope, Circuit Judges, and Thornton, District Judge.

Thornton, District Judge. It appears from the petition for rehearing that there is no matter contained therein that was not included in this appeal as originally presented. The determination of said appeal and the opinion heretofore filed are in accordance with the conclusions reached by this Court after its thorough consideration of all the factors presented on appeal.

The petition for rehearing is denied.

Approved for entry:

/s/ Thomas P. Thornton
United States District Judge
(Sitting by Designation)

Filed
3-31-61

APPENDIX D

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

No. 3253—Civil

THE HUMKO COMPANY, INC.,
Plaintiff,

vs.

Local Union 984, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL-CIO, an unincorporated labor organization; and International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL-CIO, an unincorporated labor organization,
Defendants.

No. 3254—Civil

Ralph Kent Phillipy, C. C. Penny and Cummins Templeton, Trustees, doing business as O. R. PHILLIPY & SONS COMPANY,
Plaintiffs,

vs.

Local Union 984, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL-CIO, an unincorporated association and its President, R. A. Farrell; and International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL-CIO, an unincorporated association, and its International or Field Representative, Francis J. Murtha,
Defendants.

No. 3255 — Civil

KUHNE-SIMMONS COMPANY, INC.,
an Illinois Corporation,
Plaintiff,

vs.

Local Union 984, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL-

CIO, an unincorporated association and its President, R. A. Farrell; and International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL-CIO, an unincorporated association, and its International and Field Representative, Francis J. Murtha,

Defendants.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOR JUDGMENT

These cases were brought by The Humko Company, Inc., Ralph Kent Phillipy, et al, Trustees, and Kuhne-Simmons Company, Inc., against the defendant Unions and their representatives under the Labor Management Relations Act, Sec. 301 and 303, commonly known as the Taft-Hartley Act (hereinafter called "the Act"), 29 USCA, Sec. 185 and 187, and 28 USCA, Sec. 1337 and 1338. Before trial these three cases were consolidated for the purpose of trial.

These cases were tried before the Court without a jury and, in respect to same, all three involved the same subject matter except as regards the damages claimed by the respective plaintiffs.

Upon the entire record, including the pleadings, testimony of witnesses in open court, depositions and briefs of counsel, the Court makes the following:

FINDINGS OF FACT

I.

At all times material herein, The Humko Company, Inc., (hereinafter called Humko) a Tennessee Corporation, was a division of National Dairies, with its plant on Thomas Street in Memphis, Tennessee, where its normal business was the manufacturing, selling and distribution of edible fats and oils.

D. R. PHILLIPY & SONS COMPANY, (hereinafter called Phillipy) with its principal place of business in Memphis, Tennessee, was a mechanical contracting firm.

Kuhne-Simmons Company, Inc., (hereinafter called Kuhne) was an Illinois Corporation with its principal office located at Champaign, Illinois, and was engaged in the general construction business.

II.

At all times material herein the defendant, Local Union 984, International Brotherhood of America, (hereinafter called Local 984) was an unincorporated association organized and existing for the purpose, among other things, of representing employees for the purpose of collective bargaining with their employers. It maintained its offices and place of business in Memphis, Shelby County, Tennessee, and did business regularly within the jurisdiction of this Court. Defendant, R. A. Farrell, a resident of Shelby County, Tennessee, was President and Chief Executive Officer of Local 984 and was, in this suit, sued in his representative capacity; and that Local 984, as such labor organization, was subject to the Act.

III.

The defendant, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, (hereinafter called International) was an international labor union organized as an unincorporated association. The International was composed of subordinate affiliated local labor unions located throughout the United States, and Local 984 was one of such subordinate affiliated local labor unions. The International maintains its headquarters and

principal place of business in Washington, D. C., but conducted business regularly within the jurisdiction of this Court through its member, Local 984, and its agent or representative, Francis J. Murtha, a resident of Memphis, Shelby County, Tennessee, and the defendant, Francis J. Murtha, is sued in his representative capacity only; and that the International, as a labor organization, was subject to the Act.

IV.

Francis J. Murtha, on July 12, 1957, was an organizer for International for ten Southern states, including Tennessee, with headquarters in Memphis, Tennessee, and as such his duties consisted of general duties which were assigned to him by the President or those in authority of the International to make investigation, assist in negotiations, conduct elections, trusteeships, attend hearings, and advise with the officers of local unions in respect to organizing employees of various employers. Francis J. Murtha had a desk where he transacted business on behalf of the International in the Local 984 Headquarters, in Memphis, Tennessee. He had the use of the telephone and secretaries in the office of Local 984.

V.

Local 984 was, on July 12, 1957, the certified Bargaining Agent for the Production, Maintenance and Driver hourly paid employees of the Thomas Street plant of Humko. Farrell and Kuhns, as officers of Local 984, attended and participated in collective bargaining negotiations with officials and representatives of Humko at Memphis to secure a contract for the Production, Maintenance and

Drivers hourly paid employees of the Thomas Street plant of Humko before, during and after the period of picketing at Champaign. Francis J. Murtha attended and took an active part in several of the collective bargaining meetings with the officials of Humko and the officials of Local 984. At least on one occasion Francis J. Murtha was the only representative participating in such collective bargaining negotiations with officials of Humko. At all times during such negotiations and during the period that Francis J. Murtha was engaging in such negotiations his sole and only occupation was as International organizer, and he was receiving his usual and customary salary from the International and was not paid in any way for his services by Local 984.

VI.

On July 8, 1957, during the negotiations between Local 984 and Humko, a picket line was placed at the Thomas Street plant of Humko, and on July 12, 1957, a labor dispute existed between Humko and Local 984.

VII.

In the latter part of 1956, Humko entered into a firm contract with Phillipy and Kuhne, as independent contractors, for the construction of a plant to be known as the Midwest Refinery of Humko on South Mattis Road, in Champaign, Illinois, (about 400 miles from the Humko plant at Memphis, Tennessee) which, when completed, would produce edible fats and oils, and that on July 12, 1957, pursuant to such contract, Phillipy and Kuhne were engaged in the construction of this plant. In such construction, no employees of Humko did any work of any kind or

nature whatsoever in such construction, and no employee or official of Humko gave any instructions or directions to any of the employees of Phillipy or Kuhne or any other contractor or subcontractor engaged in such construction.

VIII.

On July 12, 1957, both Phillipy and Kuhne had numerous employees of their own engaged in such construction, all of whom were members of some labor union. Phillipy and Kuhne, as independent contractors, also had several sub-contractors performing work and services on this project, all of whose employees were members of various union labor organizations. Three of such sub-contractors of Kuhne were Midwest Roofing Company of Champaign, Illinois, Champaign Asphalt Company, Champaign, Illinois, and Evan Rasmussen, Masonry sub-contractor, of Champaign, Illinois.

IX.

Neither Phillipy nor Kuhne, nor any contractor or sub-contractors, nor any of their employees, on July 12, 1957, had any labor dispute with Local 984, the International, or any other labor organization or union, local or international.

X.

The construction site of Midwest Refinery was wholly enclosed by a wire cyclone fence and the entrance gate to the construction site was a wire cyclone gate on Mattis Road where all of the employees of Phillipy and Kuhne and other contractors and sub-contractors entered the construction site.

XI.

On July 12, 1957, the construction of the Midwest Refinery was approximately 65 to 70 per cent completed. The possession of the plant or any part of it had not been turned over to Humko and on July 12, 1957, the only employees of Humko at the construction site were salaried supervisory and engineering employees. There were no Production, Maintenance and Drivers hourly paid employees of Humko at the construction site.

XII.

On July 12, 1957, the machinery for the manufacturing of edible fats and oils was not yet installed in the Midwest Refinery of Humko in Champaign, no raw materials for such manufacturing process were on the job site, and no edible fats or oils were being manufactured, sold or distributed at the Midwest Refinery of Humko in Champaign, Illinois. All of these facts were known to the agents and officers of Local 984 and the local agent of the International.

XIII.

An officer and agent of Local 984, with several striking Humko employees, whom this officer had taken with him to Champaign, Illinois, attended a meeting of business representatives of various unions at the meeting place of the Champaign Trades and Labor Council, and requested them and their Union to instruct their members not to cross the picket line and not to do any work for their neutral contractor employers who were in the process of constructing the Humko plant. He also told them they would be very poor union members if they did not respect the picket line and

that not withstanding any advice to the contrary he was going to set up the picket line on the following morning.

XIV.

On the morning of July 12, 1957, pickets from Local 984, who had been brought from Memphis, Tennessee, by an officer of Local 984, formed a picket line at the entrance gate of the Midwest Refinery of Humko at Champaign, Illinois, carrying placards bearing the legend:

"Production, Maintenance and Driver employees of The Humko Co., Memphis, Tennessee, ON STRIKE for better wages & working conditions—Members of General Drivers, Salesmen & Warehousemen's Local Union No. 984, AFL."

These pickets maintained such picket line continuously until the late afternoon of July 23, 1957. The purpose of the picket line was to stop construction work at the Midwest Refinery of Humko in Champaign, Illinois.

XV.

During the maintenance of such picket line in Champaign, a man appeared at the picket line stating that he was from the International and directed and instructed the pickets to keep walking the picket line, and these directions and instructions were followed and obeyed by the pickets. The name of the man was Mesner or Mesjner.

XVI.

On July 12, 1957, the employees of Phillipy, Kuhne and the other contractors and sub-contractors engaged in such construction work, appeared for work but none of such employees crossed the picket line on July 12, 1957, or on any subsequent working day during the time that the picket

line was maintained, for the purpose of working on such construction. No construction work of any kind was done from the morning of July 12, 1957, until the morning of July 24, 1957, by any of the employees of Phillipy or Kuhne or any other contractors or sub-contractors engaged in such construction work. These contractor employers on the job (who were secondary neutral employers) were thereby forced to cease doing business with Humko.

XVII.

On July 15, 1957, while the picket line was maintained at the Humko plant in Champaign, Illinois, at a collective bargaining meeting in Memphis, Tennessee, between Local 984 and officials of Humko, it was stated in substance by a Humko official that future negotiations were being made more difficult by the picket line being maintained at the Humko plant at Champaign, Illinois. Francis J. Murtha, International organizer, was present at this meeting when this statement was made, but no objection to or repudiation of such statement or fact was made by Francis J. Murtha on behalf of the International.

XVIII.

During the maintenance of the picket line at Champaign, Illinois, Local 984 was assured as a result of a statement made by its President, R. A. Farrell, at a local union meeting, that the International was one hundred percent behind it in that effort.

XIX.

On July 15, 1957, Kuhne, by R. W. Kuhne, its President, prepared and filed with the National Labor Relations Board, 13th Region, in Chicago, Illinois, a complaint charg-

ing Local 984 with setting up and maintaining a picket line at the Midwest Refinery of Humko at Champaign, Illinois, charging that such picket line encouraged and induced the employees of Kuhne to engage in a strike or concerted refusal to work or perform services in the course of their employment, the object of which was to force Kuhne to cease doing business with Humko. On July 23, 1957, a settlement agreement of this complaint or charge was executed by Local 984, Kuhne and Ross Madden, Regional Director of the 13th Region of the National Labor Relations Board, Chicago, Illinois, and thereafter Local 984 caused the picket line at the Humko plant in Champaign, Illinois, to be withdrawn.

XX.

There was a complete work stoppage of all construction work from and including July 12, 1957, through July 23, 1957, at the construction site, and construction work was resumed on the morning of July 24, 1957, but there was not a normal resumption of construction work nor a normal number of employees until approximately two weeks after July 24, 1957.

XXI.

The defendant, International, functions under a written constitution. The International consists of an unlimited number of local unions. One of the objects of the International is to organize all workers under one banner and to educate them to cooperate in every movement which tends to benefit the organization. The International approves or disapproves all contracts entered into between its members and their employers, and all members of local unions are

members of the International. The General President of the International has full power to determine who shall be members of the International, which shall be binding on the locals. The General President (a constitutional officer of the International) shall settle and determine all grievances and disputes submitted to him by joint councils, local unions. In the event the General President makes a decision or orders a local union to observe the laws, and the local refuses to do so, the International may suspend or revoke the charter of the local. The By-laws of local unions shall be subject to the approval of the General President. The General President may appoint a trustee to take charge and complete control of the affairs of a local union. The trustee's acts shall be subject to the supervision of the General President and he may remove trustees at any time and may appoint successor trustees. The General President may, in his discretion, restore self government to a local union. The General President, when he deems it for the best interests of the International (which is composed of local unions) is empowered to remove any International organizer.

The charters of all local unions remain the property of the International, who may demand and receive the charter of any local at any time, and upon surrender of the charter all property of the local, including money on hand, becomes the property of the International. The local must secure office supplies from the International. The International may control membership of the local. The International possesses power to assess local members and assess per capita taxes. The International controls local secretary-

treasurers of local unions even to the extent of directing the increase and decrease in the amount of bonds to be furnished by such officials. The International has complete authority to audit or have the books of all locals audited. Prior to a local union becoming involved in a strike, lockout, boycott, lawsuit or any serious difficulty, such local union shall immediately notify the Joint Council of which it is a member of any contemplated action setting forth the action contemplated and nature of the difficulty. The Joint Council shall then take steps to approve or disapprove such contemplated action. The Joint Council shall notify the General President of the steps it has taken in respect to such contemplated action. The General President is authorized to approve, disapprove or modify the action of the Joint Council.

Any local desiring to present a wage scale to its employers shall first submit a copy of the same to the Joint Council, if one exists in its city or vicinity. Should the same have the approval of the Joint Council, it shall be compulsory upon the local unions to forward a copy of the wage scale to the General President for his sanction before the same shall be presented to any employer. The General President shall have the power to inquire into conditions surrounding the local union, and if, in his judgment, conditions do not warrant the presentation of the same, he shall immediately notify the local union of his decisions in the matter. A copy of the wage scale must be in the hands of the General President at least thirty (30) days before presenting the same to the employers. No contract entered into between a local union and any employer or employer group shall be valid

and binding upon such local union until approved by the General President or unless approval thereof is at any time specifically waived by him or his representative.

The International General President has complete control over the By-laws of the Joint Council, and all locals must affiliate with one joint council and comply with its laws and obey its orders. All local unions must affiliate with and participate in activities of conferences when and to the extent ordered by the General Executive Board (of the International) in its discretion.

The International controls locals and their membership through the provisions relative to Trials and Appeals of Local Officers and Members. The International dictates the conduct of the local in the administration of its business, what the local's officers shall be, controls the local officers' duties, and dictates the rules of order for the conduct of local union meetings.

XXII.

The damages sustained by Humko, by reason of the work stoppage on the plant in Champaign, were as follows:

(a) The earnings of the Humko office and engineering employees at Champaign, and the trainee employees who had been hired in Champaign and sent to the Humko plant at Memphis for training at the time of the picketing in Champaign are damages suffered by Humko for thirty (30) days as stand-by charges caused by the work stoppage at Champaign. The amount of these earnings were $4139.12 for the employees at Champaign and $10,214.16 for the trainees at Memphis.

(b) The expenses paid by Humko to keep the trainees from Champaign in Memphis for additional thirty (30) day period as a result of the picketing in Champaign amounted to $3879.45.

(c) The amount required to pay for extra guard service from the Pinkerton Service during the actual picketing of the Champaign plant site as well as for regular guards for an additional thirty (30) days during which there was no production at the plant. This amount was $2394.24.

(d) Kraft Engineering Services providing for an additional thirty (30) days beyond the scheduled completion date which called for regular salaries during that period resulting from the work stoppage amounted to $6078.50.

(e) Expense of trip by Humko supervisor in Champaign to Memphis as a result of the picketing in Champaign amounting to $55.99.

(f) Expense of legal counsel to assist in obtaining the removal of the picket line in Champaign amounting to $1000.00, which is fair and reasonable under the circumstances.

(g) Amount required to pay taxes and insurance in the amount of $1230.00 on Humko's idle plant and property for an additional thirty (30) days as a result of the work stoppage brought about by picketing.

(h) Interest computed at 4½ percent in the amount of $23,021.59. At the time of the picketing, Humko had invested $6,139,090.00 in the plant at Champaign on which it is entitled to interest at the current bank rate for which it could have obtained loans during that time.

(i) Legal fee, in the amount of $5000.00, for the prosecution of this suit, which amount is fair and reasonable for the services rendered.

XXIII.

The damages sustained by Phillipy as a result of the work stoppage on the plant at Champaign were as follows:

(a) Loss of eight working days in the performance of its contract for the construction of the Humko plant during which time, and as a direct result of the picketing, it was deprived of the use of tools and equipment on the job, the reasonable rental value of which amounted to $4759.30.

(b) The sum of $2825.04, being the proportion of its yearly overhead attributable to the contract herein for the eight working days so lost.

(c) Out-of-pocket legal expense in the amount of $180.39 as a result of the picket line in Champaign.

(d) Attorneys' fees in the amount of $3500.00 for services rendered by the firm of Canale, Glankler, Montedonico, Boone & Locke in the prosecution of this suit, which amount is conceded by the defendants to be fair and reasonable compensation for such services.

XXIV.

The damages sustained by Kuhne by reason of the work stoppage were as follows:

(a) Kuhne, on July 12, 1957, had numerous pieces of construction equipment on the job site which were idled. It was deprived of the use of said equipment from July 12, 1957, through July 23, 1957, and the reasonable rental value of this equipment, based upon the usual, reasonable and customary charge made and paid for the use of said

equipment in the vicinity of Champaign-Urbana, Illinois, was $14,980.00.

(b) The sum of $1398.40, paid for wages plus contributions totalling $25.60 to employees' Welfare Fund to its hourly paid employees during the work stoppage, these employees being key employees needed by Kuhne upon resumption of the construction. The sum of $1288.00 for salaries plus $244.00 for payroll taxes and insurance paid by Kuhne to its salaried supervisory and office personnel who had been assigned to the Humko job.

(c) The sum of $2101.80 for general administrative and overhead expense paid by Kuhne during the period from July 12, 1957, through July 23, 1957, said payments being necessary to keep the working force of Kuhne in tact to resume work at the termination of the work stoppage.

(d) On July 12, 1957, Humko was retaining the sum of $108,933.00 from Kuhne on work completed by Kuhne as Retained Percentage under the terms of the contract between Kuhne and Humko and Kuhn was deprived of this money for twelve days which, at the rate of six (6%) per cent interest, is $214.92.

(e) The sum of $410.00, being the cost of checking existing concrete forms, grades, masonry work, materials, equipment and reinforcing steel after the pickets were removed from the job site and before construction could be resumed, together with the amount of $160.00, necessitated by reason of having to double handle brick for the construction work which could not be unloaded on the job site by reason of the picket line.

(f) Damages sustained by the three following sub-contractors of Kuhne as a result of the work stoppage occasioned by the picket line and for which these contractors have demanded payment by Kuhne:

Champaign Asphalt Company	$ 765.00
The Decorator	649.80
Midwest Roofing Company.	1121.00

(g) Legal fees resulting from the picket line and work stoppage in the preparation and filing of an unfair labor charge with the National Labor Relations Board, 13th Region, Chicago, Illinois, to cause the removal of the picket line and to minimize damages, by the firm of Reno & O'Byrne, in the sum of $1000.00, and legal fees in the sum of $5000.00, for services rendered by said firm in the prosecution of this suit, which amounts are fair and reasonable compensation for such services.

CONCLUSIONS OF LAW

I.

The Court has jurisdiction of the parties and of the subject matter of these cases.

II.

During the period of July 12-23, 1957, the plaintiffs were engaged in an activity affecting commerce as that term is used in the Act, and the defendants, Local 984 and the International, are labor organizations within the purview of and subject to the Labor Management Act.

III.

On July 12, 1957, the primary situs of the labor dispute between Local 984, the International and Humko was at the Thomas Street plant of Humko in Memphis, Tennessee.

United Brick and Clay Workers v. Deena Artware, 198 F. 2d 637, 6th C. A. (1952), Cert. Denied 344 U. S. 897; NLRB v. Associated Musicians, 226 F. 2d 900, 2nd C. A. (1955), Cert. denied 351 U. S. 962; NLRB v. Denver Building, 219 F. 2d 870, 10th C. A. (1955).

IV.

The placing of the pickets at Humko's Champaign plant constituted a secondary boycott in violation of Section 187 (a) (1), Title 29, USCA. The acts of Local 984 in sending pickets from Memphis, Tennessee, the situs of the primary employer, Humko, to Champaign, Illinois, setting up a picket line at the construction site there, had the effect of inducing and encouraging the employees of Phillipy and Kuhne, secondary neutral employers, to strike, or engage in a concerted refusal to work or perform services for Phillipy and Kuhne which, in turn, had the direct effect of attempting to force Phillipy and Kuhne to cease doing business with Humko, all of which is prohibited by the Act. United Brick and Clay Workers v. Deena Artware, supra.

V.

The International, by exercising control over Local 984, through its employees (acting within the scope of their authority) participation in collective bargaining negotiations with the primary employer, and their instructing and directing the pickets at the situs of the secondary employer, had knowledge of, participated in and ratified the acts and conduct of its Local 984 and, thereby, with Local 984 the International established and maintained a secondary boycott at the Midwest Refinery of Humko at Champaign, Illinois, Int. Brotherhood of Elec. Workers v. NLRB, 341 U. S.

694 (1951); International etc. v. Hawaiian Pineapple, 226 F. 2d 875, 9th C. A. (1955), Cert. denied 351 U. S. 963.

VI.

Officers, Farrell and Kuhn, on behalf of Local 984, and Francis J. Murtha, on behalf of International, were acting within the scope of their authority in conducting the contract negotiations and in bargaining with Humko which resulted in the picket line being established in Champaign, Illinois. Local 984 and R. A. Farrell, as its President, and the International and Francis J. Murtha, as its Field Representative, are jointly and severally liable to Phillipy and Kuhne for damages proximately resulting to these plaintiffs from the work stoppage in Champaign. Both Local 984 and the International are jointly and severally liable to Humko for damages to this plaintiff resulting from the picketing and work stoppage in Champaign. International, etc. v. Hawaiian Pineapple Co., Supra.

VII.

The plaintiffs are entitled to recover all damages which flowed directly and proximately from the establishment of the proscribed secondary boycott. United Elec. v. Oliver Corp., 205 F. 2d 376, 8 C. A. (1953); Sec. 187(b), Title 29 USCA; United Brick Workers v. Deena, Supra; International, etc. v. Hawaiian Pineapple, 226 F. 2d 880.

VIII.

Humko has incurred injury in its business and is entitled to recover damages sustained in the amount of $57,013.05, of the defendants Local 984 and the International

IX.

O. R. Phillipy & Sons Company has incurred injury in its business and is entitled to recover damages in the amount of $11,264.73, of the defendants, Local 984, R. A. Farrell, its President, the International and Francis J. Murtha, its Field Representative.

X.

Kuhne has incurred injury in its business and is entitled to recover damages in the amount of $29,358.52, of the defendants, Local 984, R. A. Farrell, its President, the International and Francis J. Murtha, its Field Representative.

ORDER FOR JUDGMENT

Judgment in accordance with the foregoing Findings of Fact and Conclusions of Law will be entered within five days.

/s/ Marion S. Boyd
United States District Judge

APPENDIX E

ADDITIONAL STATUTORY PROVISIONS

In addition to the statutory provisions quoted pages A32-A33, supra (Contained in Court of Appeals' Opinion), the following provisions of the Labor Management Relations Act, 61 Stat. 136, 29 U.S.C.A. §§151 et seq. are also involved in this case:

"Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)."

"Sec. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right."

E COPY

FILED

No. 959

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1958

LOCAL UNION 494, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, ETC., et al.,

Petitioners,

vs.

THE KUM-BACK COMPANY, INC. (A Division of National Dairy Products Corporation), RALPH KENT PHILLEY, and KUHNS-STUDEBAKER COMPANY, INC., et al.,

Respondents.

PETITION OF KUHNS-STUDEBAKER COMPANY, INC. TO THE SUPREME COURT FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Dorwin M. Hanly
101 West Church Street
Champaign, Illinois

James L. Pearson
101 West Church Street
Champaign, Illinois

Counsel for Respondent
Kuhns-Studebaker Company, Inc.

Printed at Journal Publishing Co., Champaign, Ill.

No. 950

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1960

LOCAL UNION 984, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, ETC., et al.,

Petitioners,

vs.

THE HUM KO COMPANY, INC. (A Division of National Dairy Products Corporation), RALPH KENT PHILLIPY, and KUHNE-SIMMONS COMPANY, INC., et al.,

Respondents.

RESPONSE OF KUHNE-SIMMONS COMPANY, INC., TO THE PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

QUESTIONS PRESENTED

Question One

May a Union, while in a labor dispute with an employer, picket the construction of a new plant being built by the employer but in possession of the contractor 400 miles from the employer's plant, when the Union did not represent any of the employees at the construction site and was not engaged in any labor dispute with the contractor?

Question Two

Where picketing is conducted for an unlawful objective and results in a complete shutdown of construction, are the following damage claims recoverable under §303 (b) of the L.M.R. Act:

(a) The reasonable rental value of the contractor's machinery idled, based upon the usual and customary charges made and paid for such machines in the community where the construction was being done.

(b) Wages paid by the contractor for keeping his work force intact through the work stoppage.

(c) Costs incurred in resuming construction.

(d) The contractor's general overhead and administrative expenses attributable to the construction job during the work stoppage.

(e) The damages suffered by the general contractors and sub-contractors as a result of the work stoppage.

STATEMENT

The Secondary Boycott

HumKo owned and operated a plant on Thomas Street, Memphis, Tennessee, for manufacturing edible fats and oils. Local 984 was the certified bargaining agent for the production employees at this plant. (App. 207, 223.)[1]

HumKo also owned and operated a chemical plant on Pope Street, Memphis. Local 984 did not represent the employees of this plant. (App. 293, 296, 297.)

Kuhne-Simmons Company, Inc., a general contractor, of Champaign, Illinois, was engaged by HumKo to construct a plant for it at Champaign, Illinois, to be known as The Midwest Refinery. (App. 315.) Champaign is 400 miles north of Memphis.

Local 984 for a long time had been embroiled in a labor dispute with HumKo at its Thomas Street plant. This dispute had reached an impassé. (App. 207, 208.)

Kuhne-Simmons Company, Inc., had the plant in Champaign about 65%-70% completed (App. 69, 70, 298), had not turned over possession of the plant to HumKo and no production by HumKo was in process when the work stoppage took place. (App. 192, 193.)

Neither Kuhne-Simmons Company, Inc., nor any of the sub-contractors at the construction site, at any time had any labor dispute with either petitioner or any other union. (App. 60, 85, 107, 317.)

Local 984 sent some of its members to Champaign, Illinois, placed a picket line at the only gate at the construc-

1. Page references are to pages in Joint Appendix filed in the Circuit Court of Appeals.

tion site and this picket line effected a complete shutdown of construction for 12 days. (App. 146, 147.)

Local 984 did not represent and had not requested representation of any HumKo employees at Champaign, Illinois (App. 193, 297.) In fact, one of the pickets testified "we were all aware of the fact that there wasn't any employees up there (at Champaign) except contractors and management." (App. 152.)

The avowed purpose of the picket line at Champaign, Illinois, was to stop construction (App. 124, 131, 135, 137, 138, 142, 143, 146, 147, 159, 168, 169, 170, 171, 177). An official of Local 984 in control of the picket line stated to the pickets he "was happy that all construction work was stopped and we had accomplished what we had come for." (App. 152, 170.) This was never denied by either petitioner.

In addition, without objection by petitioners, it was proved (App. 115-116, 118) that a National representative of the International Teamsters Union, a Mr. Mesner or Mesgner, appeared at the Teamsters' picket line in Champaign and "told the fellows to keep on that gate and keep walking," and then on cross-examination of this witness, the International Teamsters Union secured the information that this representative of the International Teamsters Union stated: "He said he was from the International Union and he wanted them (the pickets) to stay on that gate" (App. 118), and this witness, who was a guard at the gate to the premises where the plant was being constructed, "saw him two or three times during the strike" (App. 122). There is no evidence in this case denying these facts, or any showing this International Representative was not all he stated he was. Certainly, this evidence standing alone unexplained and not denied is sufficient to enmesh the International in the secondary boycott.

We respectfully submit *United Brick & Clay Workers v. Deena Artware*, 198 F. 2d 637; Cert. den. 344 U.S. 897, rehearing denied 344 U.S. 919, is decisive of this case. The factual situation in the *Deena* case is not nearly as strong as our facts outlined above constituting a secondary boycott.

This Court has said:

> "These findings are supported by evidence which permits, at most, conflicting inferences and are, therefore, conclusive here." *Helvering v. Lazarous*, 308 U.S. 252, 255.

DAMAGES

Kuhne-Simmons Company, Inc.'s claims for damages are set out in detail at App. 653 through 665.

Charges for equipment idled were based on the going rates in the community where the plant was being built. (App. 344.) No evidence to refute these charges was presented. *Denver Building and Construction Trades Council v. Shore*, 287 P. 2d 267, held this to be a proper element of damages.

Charges for fixed overhead charges, general administrative expense, maintenance, insurance, taxes and necessary personnel retained through the strike (Sch. 2-1, App. 659) were held to be proper elements of damage in *United Electrical, Radio & Machine Workers of America v. Oliver Corp.*, 205 F. 2d 376. No evidence showing these claims were unreasonable was presented.

Petitioners made no contention the cost to the contractor to resume construction was improper.

Attorney fees as damages were allowed in *International Longshoremen's Union v. Juneau Spruce Corp.*, 189 F. 2d 177, affirmed 342 U.S. 237.

CONCLUSION

The respondent, Kuhne-Simmons Company, Inc., prays the petition for writs of certiorari be denied.

Respectfully submitted,

DONALD M. RENO
501 West Church Street
Champaign, Illinois

JOHN L. FRANKLIN
Champaign, Illinois
402 West Church Street

Counsel for Respondent
Kuhne-Simmons Company, Inc.

Of Counsel:
RENO & O'BYRNE
501 West Church Street
Champaign, Illinois

FILE COPY

OFFICE SUPREME COURT, U.S.
FILED
JUN 12 1961
JAMES R. BROWNING, Clerk

No. 950

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1960

LOCAL UNION 984,
INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, Etc. et al,
Petitioners

vs

THE HUMKO COMPANY INC.
(A Division of National Dairy
Products Corporation), RALPH
KENT PHILLIPY et al, and
KUHNE-SIMMONS COMPANY INC.,
Respondents

BRIEF OF RESPONDENT THE HUMKO COMPANY INC. OPPOSING PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS, SIXTH CIRCUIT

CLARENCE CLIFTON,
JOHN B. MACK,
J. W. KIRKPATRICK,
1814 Exchange Bldg.,
Memphis 3, Tenn.,
Counsel for Respondent,
The HumKo Company, Inc.

The Daily News Memphis Tenn 6/8/61 50c

TABLE OF CONTENTS

	Page
Opinion Court of Appeals, Sixth Circuit	1
Jurisdiction	1
Counter-Statement of Questions Presented	3
Statement of the Case	4
Argument	14
I. Did Teamsters' Unions Post Pickets at Construction Job in Champaign to Induce Work Stoppage, etc.?	14
A - Section 301 (a) of the Act Prohibits Unions Picketing at Champaign	14
B - Section 303 (a)(2) of the Act Does Not Permit Union Picketing in Champaign	20
II. Did International Teamsters' Union Participate or Ratify Pickets at Champaign to Induce Work Stoppage?	22
III. Are District Courts Findings as to HumKo Damages Clearly Erroneous?	27
IV. Teamsters' Unions Brief	33
A - Claimed Conflict in Opinions	33
B - Free Speech	36
C - The Picketing Issue	36
D - Damage Issue	37
Certificate of Service	38
Conclusion	37

CASES CITED

Page

Bieglow v. RKO Radio Pictures, 327 U. S., 251 29
Carpenters Union v. Cisco Construction Co. CA-9, 1959 A.L.C. 585 20
I.B.E.W. v. NLRB, 341 U. S. 694 ..... 16, 18, 36
International Brotherhood of Electrical Workers v. NLRB, 341 U. S. 694 ..... 16, 18
International Longshoremens Union and International Local 8 v. Hawaiian Pineapple Co., (CA-9) 226 F. 2d. 875 ..... 27, 32
International Longshoremens Union and International Local 16 et al v. Juneau Corp., (CA-9) 189 F. 2d 177, Aff. 342 U. S. 237 ..... 26, 37
Local 618 Automotive, etc. Union v. NLRB, 249 F. 2d, 332 (CA-8) 34
Local 1976 United Brotherhood, etc. v. NLRB, (1958) 357 U. S. 93 21
NLRB v. Denver Bldg. & Construction Trade Council, 341 U. S. 675 ..... 17, 35
NLRB v. General Drivers (Otis-Massey Case), 225 F. 2d. 205, CA-5 33
NLRB v. Truck Drivers, etc., 228 F. 2d. 791, CA-5 33
Seafarers Union v. NLRB (Salt Dome Case), 265 F. 2d. 58, CA-DC 34
Story Parchment Co. v. Paterson, (1930), 282 U. S. 555 29
United Brick & Clay Workers v. Deena Artware, 198 F. 2d. 637 CA-6 ..... 19, 21, 28, 36, 37
United Brotherhood of Carpenters v. United States, 330 U. S. 395, 409 24
United Electrical Workers v. Oliver, 205 F. 2d. 276, 387 (8th Circ. 1953) 31
United Mine Workers v. Patton, 211 F. 2d. 742, 746 CA-4 1954 ..... 25, 30

OTHER AUTHORITIES

Labor-Management Relations Act:
Section 8 (b)(4)(a); 29 USC, Section 158 (b)(4)(a)— Section 301; 29 USC, Section 185 22
Section 303; 29 USC, Section 187 ..... 14, 20, 28, 37
Legislative History, Taft-Hartley Law 26

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1960

No. .....

LOCAL UNION 984, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, Etc. et al,
Petitioners

vs

THE HUMKO COMPANY INC. (A Division of National Dairy Products Corporation), RALPH KENT PHILLIPY et al, and KUHNE-SIMMONS COMPANY INC.,
Respondents

BRIEF OF RESPONDENT THE HUMKO COMPANY INC. OPPOSING PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS, SIXTH CIRCUIT

OPINION COURT OF APPEALS SIXTH CIRCUIT

This opinion is correctly cited at 287 F. 2d 231; 42 Labor Cases ¶ 16780; and 47 L. R. R. M. 2651.

The District Courts unpublished findings and conclusions (R. joint appendix, p. 683a) is attached to Petition herein at pages A40-A59.

JURISDICTION

The judgments of the Court of Appeals in case of The HumKo Company, Inc. appears in the Appendix B to the Petition for Certiorari, p. A36; and the petition to rehear was denied March 31, 1961—Appendix C, p. A39.

This petition for certiorari should be denied, for there are no special and important reasons therefor, and the District Court and the Court of Appeals Sixth Circuit have concurred in findings of facts on uncontradicted evidence that the petitioners (defendants) transported pickets four hundred miles from Memphis, Tennessee and induced and encouraged (successfully, too) employees of Kuhne-Simmons Company, Inc., and of Ralph Kent Phillippy, et al, to engage in a strike or a concerted refusal to perform any services for their respective employer, and an object (hay, the sole object) of this inducement and encouragement was to force or require contractors Kuhne-Simmons Company, Inc., Ralph Kent Phillippy, et al, and other employers to cease doing business (to-wit: construction) with and on the HumKo plant then under construction and in charge of the contractors. (Court of Appeals Opinion, Petition for Certiorari, Appendix pp. A16-A18).

The decision of the Court of Appeals Sixth Circuit is not in conflict with the decision of another Court of Appeals on this matter; and that Court expressly stated after analyzing all citations of Appellants, Petitioners here, "We can only say that we take no issue with appellants' citations, and would readily apply them if we had under consideration a factual situation which fitted into the mold of the citations". (Opinions of Court of Appeals, Petition for Certiorari, Appendix pp. A20-A-21).

The decision of the Court of Appeals (and the trial Court followed applicable decisions of this Court.

The statute involved is 29 U.S.C., sec. 187 (a). Sec. 301 (a) Tatt-Hartley Act, not iincluding amendment September 14, 1959, and is attached to Petition, Appendix pp. A31-A33.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1.

Did the appellants, International Teamsters Union, and International Teamsters Local 984, which were on strike against HumKo at its manufacturing plant at 1702 Thomas Street, in Memphis, Tennessee, its normal place of business, transport pickets to Champaign, Illinois, and there post pickets at a construction job, to induce the employees of independent contractor employers constructing that plant to engage in a concerted work stoppage with an object of the picketing to force or require these contractor employers to cease performing their contracts with each other or with HumKo?

The District Court and the Court of Appeals Sixth Circuit, concurred in findings of facts and answered: YES.

2.

Did International Teamsters Union expressly or impliedly, or is it estopped to deny that it did, authorize, ratify, participate in or render guidance to its Local 984 in the strike and use of picketing at Champaign, Illinois to induce the employees of independent contractors constructing a plant for HumKo at Champaign, to engage in a concerted work-stoppage, where an object of the picketing was to force these contractor employers to cease performing their contracts with each other or with Humko so as to make it liable to Humko for damages?

The District Court and the Court of Appeals Sixth Circuit concurred in findings of facts and answered: YES.

3.

Are Humko proved damages clearly erroneous on the evidence?

The Court of Appeals concurred with the District Court and affirmed, except it disallowed an award of attorneys fees to plaintiffs and directed the District Court to give consideration if there was one item which was duplicated.

STATEMENT OF THE CASE

HumKo does not accept the Statement of the Case by Petitioners nor the argument interspersed in the Statement.

Separate suits were brought in the United States District Court at Memphis, Tennessee, by The HumKo Co., Inc. (hereafter called HumKo), by Ralph Kent Phillipy, et al, Trustees, and by Kuhne-Simmons Company, Inc., against International Teamsters Local 984 of Memphis, Tennessee and International Teamsters Union, and certain agents and representatives of each, alleging violations of Section 303(a) of the Taft-Hartley Act, 29 U.S.C.A. Section 187 (a), prohibiting secondary boycotts, for the recovery of damages sustained and the costs of the suit.

Before trial these three cases were consolidated by the Court for the purposes of trial, and were tried before the District Court without a jury, and involve the same subject matter, except as regards damages claimed by each plaintiff. Judgment for each plaintiff was rendered.

In the language of The Trial Court: "It seems to me the question is whether or not there was a secondary boycott." (R. 244). "And that is what we are trying here, gentlemen. We are not concerned with the details of what brought on a labor dispute." (R. 245).

HumKo has a manufacturing plant at 1702 Thomas Street, Memphis, where it is engaged in its normal business of manufacturing and selling edible fats and oils (R. 223).

International Teamsters Local 984 was certified as the bargaining agent for the hourly paid maintenance and production employees and truck drivers specifically for the HumKo plant at 1702 Thomas Street in Memphis on May 1, 1957, where HumKo was engaged in its normal manufacturing activities (R. 207, 223, Stip. 295).

Contract negotiations began in June 1957 between HumKo and officials of International Teamsters Local Union 984 and an International Representative and General Organizer of International Teamsters Union (R. 207, 208, 289, 292). The Teamsters Union went on strike against the HumKo manufacturing plant on Thomas Street in Memphis July 8, 1957 (R. 207).

After International Teamsters Local 984 began its strike at the HumKo manufacturing plant on Thomas Street in Memphis, as the duly certified bargaining agent for the production employees of that HumKo plant, this International Teamsters Local petitioned the National Labor Board for an election covering employees at the Chemical Division of HumKo on Pope Street in Memphis, which was held, and the Teamsters lost that election (R. 223, 296, 297).

Later, and while International Teamsters Local 984 was still on strike against HumKo manufacturing plant on Thomas Street in Memphis, HumKo did commence production at Champaign and another International Teamster Local 26 in Champaign filed a petition to represent HumKo production employees working at the HumKo plant in Champaign and an election was held and won by this International Teamster Local 26 (R. 199, 223). Negotiations were had between HumKo and this International Teamsters Local 26 for the Champaign HumKo plant entirely independent of International Teamsters Local 984

on strike against HumKo at its plant on Thomas Street in Memphis (R. 223, 297). International Teamsters Local 984 of Memphis never made any demand on HumKo at any time to represent any employees of HumKo at Champaign (R. 297).

Soon after International Teamsters Local 984 went on strike against the HumKo plant on Thomas Street in Memphis on July 8, 1957, this International Teamsters Local 984 transported or sent persons from Memphis to Champaign to picket a construction job where independent contractors and their employees were constructing a new plant for HumKo (R. 147-147, 166-172). The construction on this plant at Champaign was only about 65 to 70% completed (R. 69, 70, 298). The HumKo plant at Champaign was in possession of the contractors (R. 320), was not in production and, in fact, was not capable of production (R. 69, 105, 192, 206, 294). HumKo had no production employees in Champaign, Illinois on this construction at that time (R. 192, 298). No testimony was offered contrary to these facts.

This picket line was established by International Teamsters Local 984 at the construction job at Champaign so that the neutral employee construction workers on this job would not continue work (R. 167), and this was made clear to the pickets who patrolled the construction job in Champaign and to the HumKo employees at the Thomas Street manufacturing plant in Memphis who were on strike (R. 124, 127, 143, 167). Also, an official of International Teamsters Local 984 stated that it was not necessary to keep up the picket line all the time at Champaign for there were no construction workers around the clock (R. 172), and no contractors worked on Saturday (R. 174). This picket line was established even though other Unions

in Champaign would make no promise to cooperate (R. 147-149). The men who walked the picket line at the construction job in Champaign were told by officers of International Teamsters Local 984 that the object of the picket line was to stop the construction at Champaign (R. 146, 147, 168, 169, 170, 177). The Teamsters Union official who was in control of the picket line in Champaign stated to his pickets he "was happy that all construction work was stopped and we had accomplished what we had come for." (R. 151, 170). No testimony was offered contrary to these facts.

This same statement of the object and purpose of the Champaign picketing was made in Memphis to HumKo employees by officials of International Teamsters Local 984 (R. 135, 137). Various officials of International Teamsters Local 984 stated the object of the picket line at Champaign was to reach the contractors who were constructing the plant under contract and make them cease doing business with HumKo on this job; (R. 124, 131, 135, 142, 159, 171); and these statements were made while the pickets were patrolling in Champaign (R. 171), and in the Union hall in Memphis after the pickets were withdrawn from Champaign (R. 124, 131, 133). No testimony was offered contrary to these facts.

There were some HumKo office employees and engineers at this construction job (but no construction workers and no production employees), who crossed the line, and the official of International Teamsters Local 984 in charge of the picket line in Champaign told the pickets "Just let them alone" or "Let them go in because we are not interested in them." (R 171, 174, 175, 179). No HumKo employees performed any construction work (R. 320). An official of International Teamsters Local 984 also stated in

Memphis that the Union pickets were against construction and not against any HumKo employees in Champaign (R. 124, 137, 143), and the Union was interested only in stopping the construction work (R. 143); and a picket who walked the picket line in Champaign stated "We were all aware of the fact that there wasn't any employees up there except contractors and management" (R. 152). No testimony was offered contrary to these facts.

International Teamsters Local 984 deliberately did all of these acts despite its counsel's warning "under no condition was this picketing (to be) directed at any one but HumKo Company. I have been in enough secondary boycotts to know what a secondary boycott"—(interrupted) (R. 427). By the undisputed and uncontradicted testimony of neutral construction workers helping to erect the plant at Champaign the neutral employees of the contractors on this construction job were effectively induced to engage in a concerted work stoppage or to refuse to perform any services on this job by the pickets placed there by International Teamsters Local 984 for that purpose (R. Painters 61-78, Roofers 81-90, Carpenters 94-97, Bricklayers 103-107). It is undisputed all employees of all the contractors, estimated at 75-100, refused to come to work on their jobs as long as the pickets were established (R. 191).

There was no labor dispute between any Unions and the contractors erecting the plant at Champaign at the time International Teamsters Local 984 sent men from Memphis to Champaign to establish a picket line to shut down all construction work (R. 60, 85, 104, 317). It is not disputed that International Teamsters Local 984 directed and participated in all phases of picketing including the strike against HumKo at the primary site on Thomas Street in

Memphis, where it was certified specifically as the bargaining agent for production employees, and at the secondary construction site in Champaign where it never sought to be the bargaining agent, and was never certified as such.

The International Teamsters Union expressly or impliedly authorized or ratified, acquiesced in and rendered guidance and participated in these unlawful acts and is estopped to deny the same as shown by these facts:

Francis Murtha is an International Teamsters Union International Representative and General Organizer for ten States (R. 290, 444). Negotiations between International Teamsters Local Union 984 and HumKo began in June 1957 before the strike at Memphis (R. 290). Francis Murtha, International Representative and General Organizer, took an active part in these negotiations with officials of International Teamsters Local 984 for a Teamster Union labor contract with HumKo before the strike of the employees at HumKo plant on Thomas Street in Memphis, Tennessee (R. 207-209, 290-292). In one of these meetings, at least, Mr. Murtha was the only Teamsters Union representative present (R. 210, 293). Mr. Murtha took part in these Teamster Union contract negotiatioins with HumKo before pickets were placed at Champaign (R. 208, 290); and while the Teamster pickets were at the construction job in Champaign, and raised no objections to the pickets at (R. 211, 212, 291, 293); and after the pickets at Champaign were removed by the Teamsters Union (R. 212, 291, 293).

A National Representative of International Teamsters Union came to the construction job at Champaign where the Teamsters pickets were patrolling and told the pickets "to keep on that gate and keep walking" (R. 116), and they did for 12 days. The guard on the gate heard him

talking to a picket and he told the picket who he was (R. 117-118), and the guard saw him two or three times during the picketing at Champaign (R. 122). There was no explanation or denial offered by International Teamsters Union or International Teamsters Local 984 of these facts.

The President of International Teamsters Local 984 stated at a Union meeting in Memphis while the pickets were at Champaign, the Local had 100% backing by International Union (R. 138-9). Mr. Murtha stated that as General Organizer for International Teamsters Union he assisted in negotiations with HumKo as part of his usual duties (R. 448-9); he said International Teamsters Union is composed of various Locals of which International Teamsters Local 984 is one (R. 454-5); he said he had use of a desk and telephone at the hall of International Teamsters Local 984 (R. 450); he said he discussed the HumKo matter with officials of International Teamsters Local 984 (R. 451); he said he discussed the Champaign matter with International Teamsters Local 984 "long prior to any strike" (R. 453); he said his duties included arranging contracts for the benefit of the Teamsters Union (R. 454), conducting elections and trusteeships (R. 456); he said the International Teamsters Union gets forty cents per member per month and there are about two thousand members of International Teamsters Local 984 (R. 455); he said he drew his full pay and salary all through these HumKo negotiations from International Teamsters (R. 458); he said that as International Teamsters Agent he took a call in the office of International Teamsters Local Union 984 from the National Labor Relations Board about the Champaign picketing (R. 361).

The damages sustained by HumKo because of the secondary boycott activities of International Teamsters Union and International Teamsters Local 984 are itemized in an Exhibit in the record of evidence (R. 563).

There was great delay in construction caused by the secondary boycott pickets at Champaign. Neutral contractors lost men from the jobs. The painting contractor could not get painters (R. 70); the brick laying contractor lost at least two men who got other jobs (R. 170). The carpentering contractor had at least three men take jobs elsewhere (R. 97-99); Mr. Kuhns, the Secretary-Treasurer of International Teamsters Local 984 said he wanted to delay completion of construction (R. 136), and gave his opinion that after the secondary boycott it would be some time to start up construction (R. 136, 138). Mr. Farrell, President of International Teamsters Local 984, gave his opinion the contractors' employees "had scattered all over the country to go to work elsewhere," and it would take three months to get in construction again (R. 152). Mr. Farrell also said the contractors would have to go out and hire new employees and start all over again" (R. 159). Mr. Kirby, Senior Vice President of HumKo, stated from on-the-spot observation, the construction was delayed by secondary boycott picketing (R. 299), and two weeks after the pickets were withdrawn he was in Champaign and by simple observation there were not as many people working, the work was not progressing as fast, and he drove the contractors to get more men on the jobs (R. 308); and "the knowledge certainly is obvious the construction was delayed" (R. 299). After discussion the HumKo officials concluded the completion of the construction at Champaign was delayed at least one month (R. 214). It is not disputed the construction was completely shut down from July 12-

July 23 inclusive, a period of twelve days, and Mr. Wood, General Manager of the Champaign plant, states there were only moderate size crews for two or three weeks after the picketing" (R. 194).

The damage items claimed by HumKo because of the secondary boycott (R. 563) are sustained by the proof:

1. The earnings of the HumKo office and engineering employees at Champaign ($4,139.12), and the trainee employees in Memphis ($10,214.16) were accrued stand-by charges for 30 days delay in the construction caused by the unlawful picketing (R. 217). These damages are explained (R. 213 and 215, 260 et seq), and are itemized in detail (R. 563-565). See also Court's finding (R. 695).

These people were being trained for work at Champaign, Illinois, and when the secondary boycott delayed completion of the plant HumKo had to bear these expenses.

2. The direct expenses paid by HumKo to keep the trainees from Champaign in Memphis for an additional 30 days because of the construction delay was $3,879.45, and is itemized (R. 565). These expenses were caused by the delay due to secondary boycott.

3. The extra guard service was incurred during the secondary boycott picketing and additional guard services were caused by construction delay (R. 218), and is broken down (R. 565) to show this total item of damages at $2,394.24. Court's finding (R. 695).

4. HumKo was charged and paid for engineering services during this month's delay in construction in the amount of $6,078.50, which is an average for the 30 days delay in July and August 1957 (R. 219). See also Court's finding (R. 695).

5. The actual railroad fare of a trip of A. H. Wood to Memphis because of problems created by the secondary boycott was fixed at $55.99 (R. 565).

6. HumKo employed legal services of Attorneys directly connected with and for work involved as a result of the unlawful pi keting at Champaign, Illinois, fees for which were discussed and agreed at $1,000.00 (R. 220), and the Court found this charge fair and reasonable and approved (R. 695).

7. The item of taxes and insurance of $1,230.00 were paid by HumKo during this 30 days delay in construction and is explained (R. 220), and is broken down (R. 565), and HumKo had to pay on idle plant and property (Court's finding (R. 696).

8. The interest on investment is proved at 4½% on its idle capital for 30 days, and totals $23,021.59 (R. 22[illegible]). It is the going rate HumKo paid for money it borrowed (R. 276).

9. Legal fees were incurred by HumKo to protect its interest in this suit and agreed upon at $5,000.00 (R. 221), and were found reasonable and proved by the trial Court (R. 696). The Court of Appeals disallowed this item.

ARGUMENT

I.

DID THE INTERNATIONAL TEAMSTERS UNIONS POST PICKETS AT A CONSTRUCTION JOB IN CHAMPAIGN, ILLINOIS, TO INDUCE EMPLOYEES OF INDEPENDENT CONTRACTORS THERE TO ENGAGE IN A CONCERTED WORK STOPPAGE TO FORCE THE CONTRACTORS TO CEASE DOING BUSINESS WITH EACH OTHER AND WITH HUMKO?

A. Section 303 (a), of the Act Prohibits Unions Picketing at Champaign.

The language of Section 303(a), 29 U.S.C.A., Section 187(a), insofar as applicable here, reads:

> "It shall be unlawful, for the purpose of this Section only, in an industry or activity affecting commerce, for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, article, materials, or commodities, or to perform any services, where an object there is . . .
> "(1)forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor or manufacturer, or to cease doing business with any other person; . . ."

The facts establishing the object and purpose of the picketing line at the construction job are fully developed in the Statement of Facts and will not be repeated in detail here. They show to a demonstration the object was

to shut down the construction—to reach the neutral employees of contractors, and not any HumKo employees.

It is not disputed nor denied that Mr. Kuhns, Secretary-Treasurer of International Teamsters Local 984, took pickets to Champaign and directed the activities of these pickets there, and told them the Union wanted to stop the construction work and keep the contractors from completing the plant, and the Union was not interested in any HumKo salaried office and management employees, but only in stopping construction workers and the contractors, and "the main reason they went to Champaign was to stop the construction of the plant."

The background of this HumKo matter is a labor dispute between International Teamsters Local 984 and HumKo to organize the production and maintenance employees and truck drivers of HumKo at its manufacturing plant at 1702 Thomas Street, Memphis, Tennessee. The International Teamsters Union and International Teamsters Local 984 contend they engaged in a primary dispute with HumKo at Champaign and directed picketing at Champaign against HumKo alone, but this assertion is rendered ridiculous by the instructions of the officials of the International Local 984 in Champaign to the pickets not to bother about picketing when only HumKo's salaried and management employees or office workers were going on the construction job, and to "Just let them alone" or "Let them go on, because we are not interested in them" (R. 171-174). These instructions were never disputed, denied or repudiated in any testimony in this case. The only way that the Union defendants could attain their purpose and object to stop construction was to induce or force employees of contractors off the job, and force or require the subcontractors to cease doing business with

the General Contractor, and the General Contractors and other direct contractors from doing business with HumKo.

The Teamsters contend for the right to picket at Champaign as a right of free speech. This same contention has been made with reference to the language of Section 8 (b) (4) (A) of the National Labor Relations Act, as amended which contains the same proscription against secondary boycotts as an unfair labor practice as contained in Section 303 (a) permitting the recovery of damages; and in *I.B.E.W. vs. N.L.R.B.*, 341 U.S. 694, the Supreme Court answered this contention:

> "The question here is what effect, if any, shall be given to Section 8(c) in its application to peaceful picketing conducted by a labor organization or its agents merely as an inducement to or encouragement of employees to engage in a secondary boycott. Petitioners contend that Section 8(c) immunizes peaceful picketiing, even though the picketing induces a secondary boycott made unlawful by Section 8(b) (4). The Board reached the opposite conclusion and the Court below approved the Board's order as applied to the facts of this case which it recognized as amounting to 'bare instigation' of the secondary boycott. We agree with the Board.
>
> "a. To exempt peaceful picketing from the condemnation of Section 8(b)(4)(A) as a means of bringing about a secondary boycott is contrary to the language and purpose of that Section. The words 'induce and encourage' are broad enough to include in them every form of influence and persuasion . . .
>
> " 'Induce or encourage' appear in like context in Section 303. The action proscribed by the terms of Section 8(b)(4) is made in Section 303 the basis for the recovery of damages in a civil action. Because Section 8(c) is in terms limited to unfair labor practice proceedings and Section 303 refers only to civil

actions for damages, it seems clear that Section 8(c) does not apply to an action under Section 303. That does not mention unfair labor practices through which alone the provisions of Section 8(c) can become applicable. If Section 8(c) were given the effect which petitioners urge, it would limit Section 8(b)(4)(A) so as to give the words 'induce or encourage' a meaning in that section different than they have in Section 303. We think that the words are entitled to the same meaning in subsection 8(b)(4) and 303 . . ."

Kuhne Simmons Company as General Contractor and the painters, the roofers, the brick layers et al were subcontractors doing business with HumKo, and the General Contractor and the subcontractor were doing business with each other. They have been damaged by the unlawful acts of the International Teamsters and its Local Union 984, and may recover. *N.L.R.B. v. Denver Bldg & Construction Trade Council*, 341 U.S. 675.

International Teamsters and International Local 984 Unions by their declared purpose and objective committed themselves to unlawfully extending their dispute with HumKo at its manufacturing plant in Memphis, where HumKo was engaged in its normal business, to a construction job in Champaign, some 400 miles away, where a plant was under construction and not in production. There were no HumKo production workers to reach and the declared purpose and immediate objective of the Union was to induce and encourage employees of the contractors on the job to refuse in the course of their employment to perform services, and an object thereof was to force or require the neutral contractors and subcontractors to cease doing business with each other or with HumKo.

Congress enacted a blanket prohibition which applies here against all strike pressures directed against employ-

ers other than HumKo, the employer immediately involved in the Teamsters dispute.

The object of the Teamsters here was a secondary boycott. However, it is settled that it is sufficient to show a secondary boycott if an objective of the picketing, although not necessarily the only objective of the picketing, was to induce employees of the contractors to engage in a work stoppage in the course of their employment, and to force the contractor employers from doing business with any other person. In *I.B.E.W. vs. N.L.R.B.*, 341 U.S. 694, the Court's language is in point:

> "There are no findings that the picketing was aimed at Langer to force him to employ union workmen on this job. On the contrary, the findings demonstrate that the picketing was directed at Deltorto's employees to induce them to strike and thus force Deltorto, the contractor, to terminate Langer's electrical subcontract.
>
> "The Denver case also covers the point that it was sufficient that an objective of the picketing, although not necessarily the only objective of the picketinig was to force Giorgi to terminate Langer's uncompleted contract and thus cease doing business with him on the project." id. pp. 699-70.

The International Teamsters Unions argue that to the extent picketing has as its object, and in fact induces employees of the struck employer to quit work and join their fellow workmen in concerted activity against their common employer it is protected. With this argument we agree, but the converse is also true that picketing here involved had as its object to induce and in fact did induce employees of a neutral employer to quit work with the object to force this neutral employer to cease doing business with any other person and it is not protected, and it is unlawful.

Such action renders the Unions so picketing liable to "whoever shall be injured in his business or property" and such person "shall recover the damages by him sustained and the cost of the suit." There is nothing in the language or legislative history of the Taft-Hartley law which indicates Congress intended to create any asylum of immunity from the proscription of secondary boycott picketing where the picketing was intended and directed at and against the secondary employers.

The Teamsters rely on a number of cases to support their contention that the Teamsters Union could go to Champaign to picket the plant under construction in support of their dispute with HumKo in Memphis, concerning its production and maintenance employees at its manufacturing plant on Thomas Street. The Teamsters stretch their contention thin by urging HumKo recognized the Teamsters Unions right to picket at Champaign in that the Union placed pickets at the HumKo Chemical plant on Pope Street in Memphis, but this is a distortion of the facts, for the record is undisputed the Teamsters Unions only picketed at this Chemical plant two or three days (R. 307) and filed a Labor Board Petition for representation and election at that plant, and lost the election held there (R. 223, 296-297) and thereafter there was no picketing.

We believe the language of the Court of Appeals, Sixth Circuit, in *United Brick & Clay Workers v. Deena Artware*, 198 F. dr 637, Cert. den. 344 U.S. 897, rehear. den. 344 U.S., 919, answers this contention:

> "It is well established by now that the right to strike under the National Labor Relations Act, Section 163, Title 29, U.S.C.A., includes peaceful picketing by the striking employees of the employer's place

of business, regardless of the damage to the employer's business resulting therefrom... *N.L.R.B. v. Rice Milling Co.*, 341 U.S., 655, 671, 71 S. Ct. 961, 95 L. Ed. 1284; *N.L.R.B. v. Service Trade Chauffeurs*, 2 Cir. 191 F. 2d. 65, 67. Such activity is generally referred to as 'primary' picketing. But the extension of such picketing for the purpose of exerting pressure on a neutral employer, generally referred to as "secondary' picketing or boycott, was, under certain conditions, made unlawful by Section 303(a) of the Labor Management Relations Act of 1947 . . .

"Appellants rely upo a number of decisions as holding that where picketing is confined to the immediate vicinity of the employer's premises it constitutes permissive primary action. *Oil Workers International Union*, 84 *N.L.R.B.* 315; *Ryan Construction Co.*, 85 *N.L.R.B.* 417; *Moore Dry Dock Co.*, 92 *N.L.R.B.* No. 93; *N.L.R.B. v. Service Trade Chauffeurs*, supra. while this is one element to be considered in determining whether picketing is primary or secondary, it is not controlling. In *N.L.R.B. v. Denver Building and Construction Trades Council*, supra, and *International Brotherhood of Electrical Workers v. N.L.R.B.*, supra, the Supreme Court held the picketing unlawful even though it was confined to the immediate premises of the employer." id. pp. 642 and 643. See also *Carpenters Union v. Cisco Construction Co.*, CA-9, 1959, cert. den. 59 A.L.C. 585.

B. Section 303 (a) (2) of the Act Does Not Permit Unions Picketing in Champaign.

Teamsters argue that the proviso of Section 303 (a) (2) of the Taft-Hartley Law, Section 187 (a)(2), 29 U.S.C.A., makes an exception to 303 (a)(1), Section 187 (a)(1), 29 U.S.C.A., and permits the picketing in Champaign. Yet the Teamsters Unions do state in their brief this contention has been rejected: "We understand, of course, that a somewhat similar claim was rejected by this Court in

United Brick & Clay Workers v. Deena Artware, 198 F. 2d 637, at p. 644," cert. den. 344 U.S. 897, re-hearing den. 344 U.S. 919. We submit this decision is conclusive:

> "In enacting Section 303(a) Congress subdivided it into four separate paragraphs, each apparently pertaining to a separate field of labor activity. There is no express provision making any one paragraph a modification or limitation of the provisions of another. In two of the paragraphs, 303(a)(2) and (a)(4) Congress expressly excluded certain activities from their general scope by the use of the word 'unless'. There is no such exception included in the wording of paragraph (a)(1). Implied exceptions to the express provisions of a statute are not favored. (Cases cited.) We are of the opinion that Section 303(a)(2) pertains to a specific, restricted field of labor activity, not necessarily included in the provisions of Section 303 (a)(1), but in any event withdrawn from its coverage for the purpose of being treated as a separate and independent field of labor activity, and that it is not to be treated as nullifying the effect of other activities of labor organizations proscribed by Section 303(a)(1)."

Petitioners urge the opinion of the Supreme Court in Local 1976 *United Brotherhood*, etc. *v. N.L.R.B.* (1958), 357 U.S. 93, is an "intervening opinion" and the *Deena Artware* case should not be followed. The Local 1976 case involved a so-called "hot cargo" clause in an agreement. This Court held that a Union which induces employees to engage in a secondary boycott when the employer has agreed, at the time of the secondary boycott, to comply with the "hot cargo" clause, is not guilty of an unfair labor practice, saying:

> "A boycott voluntarily engaged in by a secondary employer for his own business reasons, perhaps because the unionization of other employers will protect

his competitive position or because he identifies his own interests with those of his employees and their union, is not covered by the statute . . .

'It is aimed to restrict the area of industrial conflict insofar as this could be achieved by prohibiting the most obvious, wide spread, and, as Congress evidently judged, dangerous practice of unions to widen that conflict; the coercion of neutral employers, themselves, not concerned with a primary labor dispute, through the inducement of their employees to engage in strikes or concerted refusal to handle goods." id. p. 98 et seq. See also *Carpenters Union v. Cisco*, CA-9, 266 F. 2d 365, cert. den. 59 A.L.C. 585.

II.

DID INTERNATIONAL TEAMSTERS UNION PARTICIPATE IN, RATIFY OR RENDER GUIDANCE TO ITS LOCAL 984 IN STRIKE AT MEMPHIS AND USE OF PICKETS AT CHAMPAIGN TO INDUCE A WORK STOPPAGE OF EMPLOYEES OF CONTRACTORS TO FORCE THE CONTRACTORS TO CEASE DOING BUSINESS WITH HUMKO?

The Taft-Hartley Law, Section 301-303 (29 U.S.C.A. Sections 185-187), grants the right of suit against Labor Organizations for secondary boycotts. Section 301 (29 U.S.C.A. Section 185) provides:

"For the purposes of this section, in determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling."

In this case HumKo asserts liability against the International Teamsters Union and International Teamsters Local 984 for damages. The evidence in this case (cited

in detail in the statement of facts) shows that International Teamsters Union through Mr. Murtha, its International Representative and Organizer for ten Southern States, in the course of his usual duties, actively participated in negotiations for a Teamsters Union contract with HumKo and International Teamsters Local 984 as the bargaining agent for production and maintenance employees and truck drivers employed at the MumKo manufacturing plant, 1702 Thomas Street, Memphis, Tennessee before a strike was called at this plant; after a strike was called by the Teamsters Union against this Humko plant; during the time striking Teamster pickets from Memphis were placed at the construction job in Champaign, Illinois for the openly avowed purpose to induce employees of contractors erecting the plant in Champaign to engage in a concerted work stoppage with an object to force or require the contractor employers to cease doing business with HumKo; and after the pickets were removed from Champaign construction job by the Teamsters Union.

Without objection by the Teamsters, it was proved (R. 115-116, 118) that another National representative of the International Teamsters Union, a Mr. Mesner or Mesgner, appeared at the Teamsters picket line in Champaign "and told the fellows to keep on that gate and keep walking," and then on cross-examination of this witness the International Teamsters Union secured the information that this representative of the International Teamsters Union stated: "He said he was from the International Union and he wanted them (the pickets) to stay on that gate" (R. 118), and this witness, who was a guard at the gate to the premises where the plant was being constructed, "saw him two or three times during the strike" (R. 122).

No opportunity was denied the International Team-

sters Union to explain away this activity of a second International Representative. Mr. Murtha, an International Representative and Organizer, who was negotiating and advising in Memphis, was offered in evidence by the Teamsters Unions and he offered no denial that International Agent Mesner, or Mesgner was fully authorized to act as he did. This agent of International Teamsters Union was within control of International Teamsters Unions and they chose to remain quiet, and it must be presumed any testimony on this point would have been adverse to them.

Detailed references to the Record are made in the Statement of Facts. The Court of Appeals findings on this point are also in detail. See Opinion, Petitiioners Brief, p. A. 23-26.

In *United Brotherhood of Carpenters vs. United States* 330 U.S. 395, 409, there was a criminal proceeding under the Sherman Act. In passing on the responsibility of the Union the Court said:

> "Certainly an association or organization cannot escape responsibility by standing orders disavowing authority on the part of its officers to make any agreements in violation of the Sherman Act and disclaiming Union responsibility for such agreements. Facile arrangements do not create immunity from the Act, whether they are made by employee or by employer groups. The conditions of liability under Section 6 are the same in the case of each. The grant of authority to an officer of a Union to negotiate agreements with employers regarding hours, wages and working conditions may well be sufficient to make the union liable. An illustrative, but non-restrictive example might be where there was knowing participation by the Union in the operation of the illegal agreement after its execution. And the custom or traditional practice of a particular Union can also be a source

of actual authorization of an officer to act for and bind the Union." (Emphasis supplied)

In *United Mine Workers vs. Patton*, 211 F. 2d 742, 746, CA-4 1954, cert. den. 348 U.S. 824, the facts recited there are by analogy applicable here. Patton leased and operated a mine from Clinchfield on a non-Union basis. The defendant Unions struck against Clinchfield, and Patton, through pressure put upon it, ceased operation. The Appellate Court held that there was sufficient evidence to make a jury question; however, it reversed for errors in the charge and the allowance of punitive damages. The defendants United National Union and United Local Union, argued on appeal that there was no evidence to show that they ever authorized or ratified the strikes against Clinchfield. The language of the Appellate Court, in considering this contention, is applicable here:

"'. . . It is true that there is no evidence of any resolution of either the United Mine Workers or District 28 authorizing or ratifying the strikes. There is evidence, however, that the strikes were called by the Field Representative of the United Mine Workers, who was employed by District 28, and that he was engaged in the organization work that was being carried on by the International Union through District 28, which was a mere division of the International Union. Members of the Union are members of Local and District Unions as well as the International; and of the $4.00 monthly dues paid by them, $2.00 goes to the International Union, $1.00 to the Local Union and $1.00 to the District Organization. It is clear that in carrying on organizational work the Field Representative is engaged in the business of both the International Union and the District and that both are responsible for acts done by him within the scope and course of his employment." id. p. 746.

In his analysis of the Taft-Hartley Law, Senator Taft had the following to say, 93 Congressional Record, page 1001, Legislative History of Labor Management Relations Act, Volume 2, page 1622:

> "Section 2(2), 2(13), and 301(e): The conference agreement in defining the term employer struck out the vague phrase in the Wagner Act 'any one acting in the interest of an employer' and inserted in lieu thereof the word 'agent.' The term agent is defined in Section 2(13) and Section 301(e), since it is used throughout the Unfair Labor Practice Sections of Title I and in Sections 301 and 303 of Title III. In defining the term the Conference Amendment reads 'The question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.' This restores the Law of Agency as it has been developed at common law . . .
>
> "Similarly Union business agents or stewards, acting in their capacity of Union officers, may make their Union guilty of an unfair-labor practice in the bill even though no formal action has been taken by the Union to authorize or approve such conduct."

In International Longshoremens Union, and International Local 16 et al v. Juneau Corp. (CA-9) 189 F. 2d 177, affirmed 342 U. S. 237, the case was a suit for damages under Section 303(a) of the Act, and on appeal from a judgment against the International Union and Local 16 for $750,000.00 and $10,000.00 attorneys' fees and costs and disbursements. On the question of the International Union and the Local Union being bound by the acts of agents, the Court said:

> "Instructions 6 and 7 were based on the well established principle of tort law that where two persons act in concert to commit a wrong each is liable for the entire injury resulting therefrom, and that one

who abets a wrongful act is equally liable with the perpetrator. There was sufficient evidence before the court of such an understanding between Local 16 and International on which to submit the matter to the jury for its determination."

In International Longshoremens Union and International Local 8 v. Hawaiian Pineapple Co. (CA-9) 226 F. 2d. 875, Cert. denied 351 U. S. 963, there was a suit for damages for secondary boycott and an appeal from a judgment of $201,274.27 against the International and Local 8 for damages including attorneys fee. On the question of the International being bound by the acts of its agent, the Court said:

"By section 301 of the Taft-Hartley (see 29 U.S.C.A. 185) an employer or a union is 'bound by the acts of its agents' and 'the question of whether the specific acts were actually authorized or subsequently ratified shall not be controlling.'' Surprisingly, there is little case law yet on the agency feature of the section. Probably the practical result of the section in the case of labor unions was to restore the general rules of agency, particularly the rules of apparent authority which had been curtailed by the Wagner Act and the decision of United Brotherhood of Carpenters and Joiners v. United States, 330 U. S., 395, 47 ALC 257. We thing the section was intended to cover the acts of officers of the union who deal with employers or with the public. That is, if a union puts or lets an officer or other representative get into a position where he can and does cause trouble proscribed by the Act, then the union is responsible."

III

ARE THE DISTRICT COURT'S FINDINGS AS TO HUMKO'S DAMAGES CLEARLY ERRONEOUS ON THE EVIDENCE?

The findings of the District Court and the Court of Appeals on this point are based on facts and will not be reviewed by the Supreme Court. These facts are shown in detail under Statement of Facts based on the record; and are considered in the District Court's and the Court of Appeals Opinions. (Pet. brief, pp. A 52, A 26.)

Section 303 (b) of the Act, 187(b), 29 U.S.C.A., provides:

> "Whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue therefor in any District Court of the United States subject to the limitations and provisions of Section 301 hereof without respect to the amount in controversy, or in any other Court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit."

Whoever shall be injured in his business by secondary boycott shall recover the damages by him sustained and the cost of the suit. No point is made by Petitioners of the right of HumKo, as primary employer, to recover damages. This is settled. *United Brick & Clay Workers v. Deena Artware,* 198 F. 2d 637, cert. denied 344 U.S. 897, re-hearing denied 344 U.S. 919.

Teamsters Unions admit if the picketing is unlawful, proscribed by Section 303(b) of the Act (Section 187(b), 29 U.S.C.A.), there was some damage (International Teamsters Local 984 Brief p. 55). As restricted as the Teamsters would make HumKo's right of recovery of damages it seems the sole question is "how much."

Teamsters Unions contend the damages are speculative, and are without substantial support in the evidence. We must keep in mind that this case demands damages from International Teamsters Union and its International Local 984 for statements and acts by Union officials and repre-

sentatives for declared purposes, and intentions, and unlawful action in accordance therewith, and the accomplishment of the objects sought.

In *Story Parchment Co. v. Paterson* (1930), 282 U.S. 555, there was a suit arising under the Sherman Anti-Trust Act to recover damages. There was a recovery in the District Court. The Court of Appeals, First Circuit reversed. The Story case is quoted in the Court of Appeals opinion in this case and is in point here.

In *Bieglow v. RKO Radio Pictures,* 327 U.S., 251, there was a suit for treble damages under the Sherman Anti-Trust Act. There was a recovery in the District Court. The Court of Appeals, Seventh Circuit, reversed on the grounds the damages were not sufficiently proved and were speculative. The Supreme Court disagreed and said:

> "Hence, it is said, petitioners' evidence does not establish the fact of damage, and that further, the standard of comparison which the evidence sets up is too speculative and uncertain to afford an accurate measure of the amount of the damage.
>
> "The case in these respects is comparable to *Eastman Kodak Co. v. Southern Photo Materials Co.* 273 U.S. 359, 71 L. ed. 684, 47 S. Ct. 400, and *Story Parchment Co. v. Patterson Parchment Paper Co.* 282 U.S. 555, 75 L. ed. 544, S. Ct. 248, in which precisely the same arguments now addressed to us were rejected . . .
>
> "In such circumstances 'juries are allowed to act on probable and inferential as well as upon direct and positive proof.' *Story Parchment Paper Co.* supra (282 U.S. 561-564, 75 L. ed. 547-549, 51 S. Ct. 248); *Eastman Kodak Co. v. Southern Photo Materials Co.* supra (273 U.S. 377-379, 71 L. ed. 690, 691, 47 S. Ct. 400).

> "Any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim. It would be an inducement to make wrongdoing so effective and complete in every case as to preclude any recovery by rendering the measure of damages uncertain. Failure to apply it would mean that the more grievous the wrong done, the less likelihood there would be of a recovery.
>
> "The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created." id. pp. 263, 4, 5.

The construction work would not have been stopped, the construction of the plant would not have been shut down — and the delay in completion would not have occurred, with all attendant and concurrent expenses, if the unlawful picketing had not happened. The record has evidence and the District Court and the Court of Appeals have found that the purposes and object of the picketing at Champaign was a secondary boycott. The only real question before the District and Appellate Court was: Can the Teamsters Unions profit and be absolved from liability from their own deliberate and planned wrong?

In *United Mine Workers v. Patton* (CA-4) 211 F. 2d 742, cert. den. 1954, 348, U.S. 824, future profits were allowed as damages:

> "Another argument is that no damage has been shown because it is said that the three year lease had not been delivered and future profits of the business which plaintiffs were forced to abandon were purely speculative. We think, however, that the evidence sufficiently showed that the plaintiffs had established a profitable business under the arangement they had with Clinchfield, and that irrespective of the three year lease a sufficient basis had been laid for an award of damages."

In *United Electrical Workers v. Oliver*, 205 F. 2d 376, 387 (8th Circ. 1953) the Appellate Court in discussing the question of damages for secondary boycott on a Section 303 (a) suit stated as follows:

> "Plaintiff sought to recover as damages the necessary expenditures incurred by it during the period of the strikes and for which it received no return in productive labor. These expenses were fixed overhead charges, including the expense of maintaining the plant, the salaries of supervisory and professional employees and other essential personnel necessarily retained by the Company while the strikes were in progress, property insurance, property taxes, compensation and group insurance, social security taxes, and employees pension liability:
>
> "Plaintiff's evidence to establish its standby expense may be summarized. Overhead expense is the necessary cost incurred by a Company in its operations which cannot be easily identified with any individual product and which by accepted cost accounting procedure is spread over or allocated to the productive labor, which is labor performed in the processing of the company's product. Such expenses do not fluctuate directly with plant operations. They are expenses necessary to keep the Company on a going concern basis or based upon the Company's production which is planned for a year in advance. They are constnat regardless of fluctuations and plant operations. When productive labor in a plant is reduced for any period to less than the normal, the Company sustains a loss in the expenditure of necessary overhead for which it received no production. During the periods of the strikes the productive labor in the plant was 52½% of normal. Since during the periods in question that Company received only 52½% of normal production of the plant while at the same time compelled to incur its standby overhead expenses, the jury might in all the circumstances find that its loss amounted to

47½% of the overhead, for which no return was received in the form of productive labor. This loss on plaintiff's computation was $51,379.32. In addition plaintiff offered evidence to show a loss in expense for power and light purchased but not useable because of the interruption of operation due to the strikes amounting to $5,062.06, and for expenses of $11,851.90 for storage of products and material outside the plant made necessary by reason of the strikes. A total of all losses claimed for the three strikes was $68,293.28. The jury verdicts on Counts II and III were for that part of this loss which plaintiff's evidence attribute to the strikes involved in those Counts." See also *Standard Mach. Co. v. Duncan Shaw* (CA-1) 208 F. 2d 61, 64.

In *International Longshoremens Union v. Hawaiian Pineapple* (CA-9) 226 F. 24 873, cert. den. 351 U.S. 964, suit was for damages for secondary boycott activities prohibited by Sec. 303 (a) of the Act. Damages were recovered for over $200,000.00. The plaintiff's claim for damage (attached to the opinion in appendix A) included salaries, wages and expenses of its officials and employees, expenses of legal and public relations counsel, and special police officers, and were submitted and included in the damages awarded and recovery therefor approved.

In the language of the cases the evidence offered by HumKo shows the extent of the HumKo damages as a just and reasonable inference, and the Teamsters Unions are not entitled to complain that they are not measured with exactness and precision that would be possible if the case, which the Teamsters Unions above are responsible for making, were otherwise. The speculation here is really on the other foot for the Teamsters Unions speculated they would get by with their secondary boycott and they not successful.

With the declaration by the Appellate Courts and the Supreme Court that the constant tendency of the courts is to find some way in which damages can be awarded when a wrong has been done, we submit the risk of uncertainty of damages, if any, must be thrown on the appellant Teamsters Unions as conscious wrongdoers. Certainly the courts do not invite depredation by these Teamsters Unions without relief to HumKo as an injured party.

IV.

TEAMSTERS UNIONS BRIEF

A. Teamsters Claimed Conflict in Opinions.

This contention falls short. The Teamsters cite three Appeals cases, without argument, for their contention. They are not in conflict with the instant case. These cases have been considered by plaintiff HumKo, by the District Court and by the Court of Appeals, Sixth Circuit, and in the language of the Court of Appeals, Sixth Circuit, in this case "we take no issue with appellants' (petitioners') citations, and would readily apply them if we had under consideration a factual situation which fitted into the mold of the citations."

Teamsters cite NLRB vs. General Drivers (Otis-Massey case) 225 F. 2d 205, CA-5, and quote therefrom (brief p. 16) for the proposition that peaceful picketing at common premises directed solely against the primary employer is lawful. We do not disagree.

This same Court considered and dealt with Teamsters Unions tactics in NLRB v. Truck Drivers, etc., 228 F. 2d 791, CA-5, and held in accord with the Sixth Circuit in this case:

"As to the first contention with respect to peaceful

> picketing, it is sufficient to say that the Supreme Court has held that peaceful picketing is not exempted from the condemnation of Section 8(b)(4) where an objective, although not necessarily the only objective, was to induce or encourage concerted action by the employees of a secondary employer. *International Brotherhood of Electrical Workers v. Labor Board*, 341 U.S. 694. Under the authority of this case, it must therefore be held that respondents have violated the Act if the Board correctly inferred that the picketing had as one of its objectives a purpose which is prohibited by Section 8(b)(4) (A) and (B) of the Act." id. p. 793.

Teamsters cite Local 618 Automotive, etc. Union v. NLRB 249 F. 2d 332-(CA-8) as being in conflict with the Sixth Circuit here. There is no conflict. There the Union had been on strike for some months, and picketed one station and continued the picketing during remodeling. The Court found the picketing was the same prior to and after the construction work started. However, this Court of Appeals observed that if the picketing being considered was not for a legitimate purpose in connection with the primary strike it would be unlawful.

The District Court and the Court of Appeals in the instant case have concurrently found, from undisputed testimony of the Teamsters pickets at Champaign, that the Teamsters intent and purpose was to reach the construction workers of the independent contractors and shut down the construction; and as to HumKo employees "Just let them alone", and "Let them go in (the premises) because we are not interested in them." (R. pp. 171, 174, 175).

The Teamsters cite Seafarers Union v. NLRB (Salt Dome case) 265 F. 2d 58, CA-DC, as being in conflict with the Court of Appeals opinion in the case at bar. There is no conflict.

In the Salt Dome case the Union had a dispute with a ship owner, Salt Dome Construction Company, and the Court found the Union picketed the Salt Dome ship while it was at the Todd yard "in the normal business of its lessee operator" Salt Dome Construction Company, and "all the evidence negatives an objective on the part of the Seafarers Union to force or require Todd to do anything." We agree with the Court of Appeals reasoning in this Seafarers Union case:

> "The question is the objective. In the case at bar if the objective of the strike encompassed Salt Dome (Consctruction Co.) only, it was legal. If its objective was partly Todd or its employees it was illegal . . .
>
> "Did the Union intend to place a boycott on Salt Dome alone, with only an incdental economic effect on Todd and Gulf, or did it intend to place a boycott on Todd and Gulf along with Salt Dome?
>
> "In the absence of admissions by the Union of an illegal intent the nature of acts performed shows the intent."

The Teamsters in this HumKo case have admitted to their pickets, nay, have declared to their pickets, that the strike in Champaign, the picket line implementing this strike, was only to reach the contractor and sub-contractors and their employees; and the Teamsters were not interested in reaching any HumKo employees at Champaign and advised they were not interested in them.

Labor Board cases are cited by the Teamsters on a claim of conflict with the Sixth Circuit holding in the case at bar. Most of these cases were decided prior to the Supreme Court decisions June 4, 1951 beginning with NLRB v. Denver Building Trades, etc., 341 U.S. 675 et seq; and in this group of Supreme Court decisions these

Labor Board decisions were cited and relied on by the Union and rejected.

These cases are cited, considered, and analyzed in *United Brick & Clay Workers vs. Deena Artware* 198 F. 2d 637, CA-6, cert. denied 344 U.S. 897, rehear. den. 344 U.S. 919.

These cases were cited by the Teamsters on appeal in this case and were re-analyzed in this HumKo case by the Sixth Circuit, and no issue taken with them. On the factual situation of HumKo, here the Teamsters have asserted to their pickets and have not disputed that their interest, their object, their purpose in placing pickets at the construction site of the HumKo plant in Champaign, Illinois, was only to reach the general contractor, the sub-contractors, and the employees of these employers and shut down the construction, and they were not interested in HumKo employees.

B. Free Speech.

The right of Teamsters Unions to violate the proscription against secondary boycotts is asserted on the basis of the First Amendment to the United States Constitution. This contention has been considered and rejected, and the law settled in I.B.E.W. v. NLRB 341 U.S. 694.

C. The Picketing Issue.

There is no conflict of law nor in decisions applying the law.

The Teamsters Unions stress the importance of the "Picketing Issue" as a consideration for granting certiorari but cite no authority of statute or case, nor any conflicts.

The Picketing Issue is important, for by undisputed testimony of the Teamsters Unions pickets this picketing was to reach neutral employees and their employers, for an object and purpose proscribed by the law of the land —set forth by clear statute terms, and by this Court decisions in equally clear terms.

D. Damage Issues.

This point presents no ground for granting certiorari. There is no conflict of decisions. The law is remedial, and is clear and precise, 29 U.S.C., Sec. 187(b): "Whoever shall be injured in his business or property by reason of any violation of subsection (a) of this section may sue . . . and shall recover the damages by him sustained and the cost of the suit."

The facts on this point are fully developed in our Statement of Facts, and in our argument on this point, supra.

See: *United Brick etc. Workers v. Deena* 198 F. 2d 637, CA-6, cert. den. 344 U.S. 897, rehear. den. 344 U.S. 919.

Longshoremen v. Juneau Spruce 189 F. 2d 177, aff. 342 U.S. 237.

CONCLUSION

Respondents submit that no writs of certiorari should be granted, and the petition herein should be denied.

Respectfully submitted,

CLARENCE CLIFTON,
JOHN B. MACK,
J. W. KIRKPATRICK,
1814 Exchange Bldg.,
Memphis 3, Tenn.,
Counsel for Respondent,
The HumKo Company, Inc.

CERTIFICATE OF SERVICE

I certify that on June ...., 1961, I served a copy of the attached brief upon L. N. D. Wells, Jr., and Charles J. Morris, 1610 National Bankers Life Building, Dallas 1, Texas, and Anthony J. Sabella, 81 Madison Building, Memphis 3, Tennessee, Attorneys for Petitioners, by depositing a copy in the United States mail, post paid, and addressed to each at the above respective addresses, and copies likewise mailed to Donald M. Reno, Fleetwood Building, Champaign, Illinois, Attorney for Kuhne-Simmons Co., Inc., and John M. Heiskell, Commerce Title Building, Memphis 3, Tennessee, Attorney for Ralph Kent Philippy, et al.

Attorney for Respondent,
The Humko Company, Inc.

No. 950

In the

Supreme Court of the United States

OCTOBER TERM, 1960

PETITIONERS' REPLY TO RESPONSES TO PETITION FOR WRITS OF CERTIORARI

INDEX

	Page
I. Effect of the Reserved Gate Doctrine	2
II. Misstatements in Responses	7
Conclusion	9

Cases Cited

Local 618 Automotive etc. Union v. N.L.R.B. (Site Oil), 249 F. 2d 332	6
Local 761, Electrical Workers v. N.L.R.B., U. S. , 5 L. Ed. 2d , 81 S. Ct.	1
Sailors' Union of the Pacific (Moore Dry Dock), 92 N.L.R.B. 547	4

No. 950

In the

Supreme Court of the United States

OCTOBER TERM, 1960

LOCAL UNION 984, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, ETC., *et al.*,

Petitioners,

v.

THE HUMKO COMPANY, INC. (A Division of National Dairy Products Corporation), RALPH KENT PHILLIPY, and KUHNE-SIMMONS COMPANY, INC., *et al.*,

Respondents.

PETITIONERS' REPLY TO RESPONSES TO PETITION FOR WRITS OF CERTIORARI

Petitioners file this reply to the Responses to Petition for Certiorari primarily because of the question which the recent *General Electric* case now poses. *Local 761, Electrical Workers v. N.L.R.B.*, U. S. , 5 L. Ed. 2d , 81 S. Ct. , decided May 29 of the current term.

Neither of the Responses filed herein refers to that decision, although the holding in that case directly affects the question posed by the instant case. Petitioners file this reply for the further reason that they desire to note several glaring misstatements contained in the Responses.

I. Effect of the Reserved Gate Doctrine

This Honorable Court held in the *General Electric* case that the controlling consideration in determining the illegality of picketing at a gate reserved for neutral employees at an employer's primary premise was:

> "* * * the work done by the men who use the gate must be unrelated to the normal operations of the employer, and the work must be of a kind that would not, if done when the plant were engaged in its regular operations, necessitate curtailing those operations."

In *General Electric* there was no question that the normal operations of the employer consisted of producing appliances, but did not include construction of plant improvements. In the instant case, however, the normal operations of the employer included providing architectural and engineering services in connection with the building of its own additional plant and also the hiring and training of new employees who would ultimately become production employees at the new plant. These "normal operations" were in addition to the operation of producing edible fats such as shortening, cooking oil and margarine. The question is presented: Does a union have the same right to picket at a second (but not necessarily secondary) site occupied by an employer when the employer is engaged in normal but different operations from those engaged in at the site where its employees are on strike?

Such picketing in the instant case was necessitated by the facts of life in modern corporate industry. The employees of one plant (at Memphis) of National Dairy Products Corporation were on strike. That plant normally produced edible oils and was operated by one division of the employer called

"Humko". For the strike to be evenly slightly effective against such a giant corporation the union needed to appeal to employees working at and being hired at another location where the employer was building a new plant to produce exactly the same product as the struck plant. The imminent distribution of Humko oils from the new plant could only diminish the effect caused by loss of production at the struck plant.

A material fact ignored by the courts below and also by the Responses filed herein was that National Dairy Products Corporation, Kraft Engineering Division and Humko Company were all one and the same employer within the meaning of both the common law and the labor law. Notwithstanding the differences in names, all employees of National Dairy, Kraft Engineering and Humko at the Champaign site were employees of the same corporation, which corporation was the primary employer engaged in a dispute with petitioner local union. Petitioners contend that the local union had a right to appeal to all persons approaching the Champaign site in exactly the same manner as it appealed to persons approaching the Memphis site where the striking employees normally worked. In view of the *General Electric* decision, petitioners, of course, concede that the union could not have lawfully picketed a reserved gate located at the Champaign site if such gate had been restricted to employees of Kuhne-Simmons Co., Inc., Ralph Kent Phillipy and other contractors performing construction work. However, it is undisputed that access to the Champaign plant site was available through only a single gate with the exception of a railroad gate used exclusively by the railroad. No picketing occurred at the railroad gate. The picketing which occurred at the common gate,

used by employees of the primary employer as well as employees of the contractors, clearly met all of the *Moore Dry-dock*[1] standards:

(1) The situs of dispute was located on the Champaign premises for the reason that the employer was actively engaged in hiring production employees at an office located at the site, which employees were being sent to Memphis to work behind the picket line at the struck plant while in training for reassignment to later production work in Champaign. Also, truck drivers from the bargaining unit of the Memphis plant regularly hauled material from the Memphis plant to the Champaign plant.

(2) Primary employer was engaged in its normal business and it was its normal business to construct its own plants, providing architectural and engineering services through its own engineering department. It was also hiring and training and performing other duties. Employer's attorney admitted that at the time of the picketing the employer in Champaign was engaged in its "normal business activities * * * to build that plant and hire and train employees at that plant site, and take them to Memphis for further training, and further to send them back to Champaign for actual duties on the job." He called these "preliminary activities in terms of personnel, which was very much their *normal business activity*" (91a-92a, emphasis added).

(3) The picketing took place immediately at the gate, as close as possible to the office where the primary employer was engaged in these activities.

[1] Sailors' Union of the Pacific (Moore Dry Dock), 92 N.L.R.B. 547.

(4) The picketing clearly disclosed that the dispute was only with the primary employer, for the picket sign was specifically limited to the Humko Company, and the site bore a large sign indicating that it was the plant of the Humko Company.

Certiorari should be granted in this case in order to clarify the rights of a union to picket a large employer engaged in activity at widely separated locations. Surely it is not the law that a large employer may immunize itself from picketing by virtue of its plants being scattered. A large corporation will draw upon its full economic resources to sustain a strike. Conversely, a union has the right to picket such an employer at any location where it is engaged in its normal operations. Thus, the fact that the Champaign, Illinois Plant, which was designed to produce the same product as the struck plant, was 400 miles away should be of no material significance. Likewise, it should not be material to this case that substantial numbers of individual employees of contractors refused to cross the picket line at the primary employer's premises. There was no gate reserved for these employees. Therefore, the right to picket generally the one common gate at those premises should not have been proscribed.

The extent to which primary employer, National Dairy-Humko, was actually engaged in normal operations at the Champaign site while the picketing was in progress is even indicated by the damage award to Humko. Such award included $4,139.12 representing earnings of Humko employees

in Champaign and $6,078.50 representing wages and salaries to Kraft Engineering employees in Champaign. There was an additional item of $10,214.16 representing the wages of trainees at the Memphis Plant, many of whom were hired in Champaign at the office located on the job site, all of whom were destined for production jobs at the Champaign plant. At the exact time of the picketing there were 16 National Dairy-Humko employees working at the Champaign site. The number of employees of the primary employer using the common gate was thus certainly not *de minimus*.

In light of the reserved gate decision, the foregoing questions require clarification. This is especially so in comparing the rule of law expressed by the Eighth Circuit in *Local 618 Automotive etc. Union v. NLRB (Site Oil), 249 F. 2d 332.*

In that case picketing was directed to the employees of a neutral contractor at a remote site occupied by the primary employer when the primary employer had no employees on the job. But such picketing was treated by the Court of Appeals as primary picketing and thus not within the proscription of Section 8(b)(4)(A). Ir view of the heavy damage penalties contained in Section 303 of the Act, labor unions will incur great risk and possible bankruptcy unless guidelines are spelled out regarding picketing of a primary employer at a location removed from the actual place of the labor dispute, although such employer is engaged in its normal operations.

II. Misstatements in Responses

1. The Humko Response (p. 2) alleges that the plant under construction was "in charge of the contractors". It is undisputed that the opposite was true. It was in charge of the Kraft and Humko engineers (193a) and Humko maintained the insurance on the property and contracted for and paid for the Pinkerton Guard Service (523a, 548a, 550a).

2. Both the Humko Response and the Kuhne-Simmons Response allege that a National or International representative of International Teamsters Union came to the Champaign site and told the pickets "to keep on that gate and keep walking". The record is to the contrary, for on cross-examination the witness who allegedly heard this man talking to a picket stated that he did not know what international union the man was referring to and that it could have been "any international union" Respondent Humko is patently misquoting the record, using such evidence as proof that "a national representative of *International* Teamsters Union came to the construction job at Champaign". (Emphasis added.) (p. 9 of Humko Response, 118a).

3. Likewise the record is misquoted as to the allegation that the local business agent said that he had "100% backing by International Union" (p. 10-Humko Response). The witness who so testified stated that he was not sure whether the business agent was referring to financial backing or

another type of backing, but that the backing was "for the benefit of the men that was out on strike * * * *here in Memphis*". (Emphasis added, 140a.) The "backing" was not related to the Champaign picketing. But even more significant, he testified that he did not know whether the business agent was successful in getting that backing (142a).

4. The Humko Response further misquotes the record in stating that International Representative Murtha "discussed the Champaign matter" prior to the strike (p. 10). A reference to the cited page in the record (453a) shows just the opposite—that the witness denied any such discussion and there was no other evidence of such a discussion.

The foregoing attempts to infer a factual basis for responsibility of the International Union represent a distortion of the record. Petitioners do not seek certiorari here based upon disputed issues of fact, for the record is clear that the International Union was held liable solely on the basis of its affiliation with the local as contained in the union constitution, and on the basis that an International Representative, at the request of the employer, assisted in some of the negotiations for a collective bargaining contract. The International Representative, however, had no prior knowledge—and the record is undisputed on this point—of the Champaign picketing.

CONCLUSION

Petitioners respectfully pray that writs of certiorari be granted for reasons set out hereinabove and in its original petition.

Respectfully submitted,

CHARLES J. MORRIS,
L. N. D. WELLS, JR.,
1601 National Bankers Life Building,
Dallas 1, Texas.

DAVID PREVIANT,
511 Warner Theatre Building,
Milwaukee 3, Wisconsin.

ANTHONY J. SABELLA,
Suite 1401 Columbian Mutual Tower,
Memphis 3, Tennessee,
Counsel for Petitioners.

June 13, 1961.